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No. 15291

**United States
Court of Appeals**
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

MERVIN L. GARDNER and MYRTLE G.
GARDNER, His Wife,
Appellees.

Transcript of Record

**Appeal from the United States District Court
for the District of Nevada**

FILED

JAN - 7 1957



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

CHARLES K. RICE,

Assistant U. S. Attorney General,
Tax Division, Department of Justice,
Washington 25, D. C.;

FRANKLIN RITTENHOUSE,

United States Attorney,
Post Office Building,
Reno, Nevada.

For the Appellant.

STEWART & HORTON,

Attorneys at Law,
131 West Second Street,
Reno, Nevada,

For the Appellees.



In the District Court of the United States
for the District of Nevada
No. 1210

MERVIN L. GARDNER and MYRTLE G. GARD-
NER, His Wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

STIPULATION

It Is Hereby Stipulated by and between counsel for the parties above named that plaintiffs may file herein a Second Amended and Supplemental Complaint, adding a Third Supplemental Complaint to the previous Amended and Supplemental Complaint filed herein.

It Is Further Stipulated that the defendant may have twenty days within which to answer the complaint as amended.

Dated: This 12th day of December, 1955.

/s/ ROYAL A. STEWART and

/s/ RICHARD W. HORTON,
Attorneys for Plaintiffs.

UNITED STATES OF
AMERICA,

By /s/ STANLEY H. BROWN,
Asst. U. S. Attorney,
Attorney for Defendant.

[Endorsed]: Filed December 14, 1955. [17*]

[Title of District Court and Cause.]

SECOND AMENDED AND SUPPLEMENTAL COMPLAINT

Amended Complaint

Plaintiffs Complain of the United States of America and allege as follows:

I.

That jurisdiction of this action is conferred by Section 1346 (a) (1) of Title 28 of the United States Code.

II.

That plaintiffs are citizens of the United States and reside at the City of Reno and State of Nevada.

III.

That this action is one to recover an income tax erroneously and illegally assessed and collected without authority and wrongfully collected, and one to collect the sum hereinafter set forth, under the Internal Revenue Laws of the United States pursuant to authority conferred to sue by Section 1346 (a) (1) of Title 28 of The United States Code.

IV.

That for the calendar year ending December 31, 1952, plaintiffs' employer, Gardner Supply Co., a Corporation, withheld from plaintiffs' wages the sum of Two Thousand Three Hundred Two Dollars Twenty Cents (\$2,302.20) based upon an alleged

total wage of Fourteen Thousand Twenty-five Dollars (\$14,025.00); that said [18] income tax so withheld was erroneously and illegally assessed and collected without authority and wrongfully collected and paid to the extent of Two Thousand Two Hundred Forty-seven Dollars Forty-six Cents (\$2,247.46), arising from the fact that:

A. Plaintiffs' employer, Gardner Supply Co., credited upon the books of said corporation the sum of Seven Thousand Four Hundred and Twenty-five Dollars (\$7,425.00) never paid to or made available or available for the use of plaintiffs.

B. That by reason of the above reduction in income, plaintiffs' medical and dental expense deduction allowed and allowable is increased from Eight Hundred Seventy-nine Dollars Eighty-seven Cents (\$879.87) to the sum of One Thousand One Hundred Fifty-one Dollars Twelve Cents (\$1,151.12).

V.

That on or about the first day of January, 1954, plaintiffs filed with the Director of Internal Revenue at Reno, Nevada, an amended return requesting such refund in the sum of Two Thousand Two Hundred Forty-seven Dollars Forty-six Cents (\$2,247.46) plus interest on the tax wrongfully collected without authority for the calendar year ending December 31, 1952. A true copy of the said amended return is attached to the original complaint on file herein and marked Exhibit "A" and is made a part hereof by reference; a true copy of

the withholding statements for the calendar year ending December 31, 1952, is attached to the original complaint on file herein and marked Exhibit "B"; a true copy of the plaintiffs' original Income Tax Return for the calendar year 1952 is attached to the original complaint on file herein and marked Exhibit "C" and is made a part hereof by reference. That plaintiffs made an error in computing capital loss and that the adjusted gross income of plaintiffs for the calendar year 1952 was [19] Eight Thousand Seven Hundred Eighty-one Dollars Fifteen Cents (\$8,781.15) instead of Six Thousand Seven Hundred Eighty-one Dollars Fifteen Cents (\$6,781.15), and that plaintiffs' income tax for said year should be and is Four Hundred Twenty-one Dollars Eighty Cents (\$421.80).

VI.

That said demand for refund has been refused by defendant through its Director of Internal Revenue by reason of the fact that more than six months have elapsed since the filing of the claim for refund and said claim has not been allowed, and plaintiffs have been damaged thereby in the sum of One Thousand Eight Hundred Eighty-one Dollars Forty Cents (\$1,881.40) plus interest.

Supplemental Complaint

First Supplemental Count

As and for a first supplemental count plaintiffs complain of the United States of America and allege as follows:

I.

Reallege as if set forth here in haec verba Paragraphs I, II and III of plaintiffs' amended complaint.

II.

That for the calendar year 1953 plaintiffs overpaid their income taxes by the amount of Two Hundred Seventy-six Dollars Forty-six Cents (\$276.46).

III.

That Two Hundred Thirty Dollars Fifteen Cents (\$230.15) of said overpayment was assessed and applied to payment of alleged penalties on plaintiffs' income tax for the calendar year 1951, that said assessment, collection and application was erroneously and illegally made for the reason that plaintiffs fully and timely paid their income taxes for the calendar year 1951 and no penalties [20] were due or payable or properly assessable.

V.

That on February 23, 1955, plaintiffs filed with the Director of Internal Revenue at Reno, Nevada, a claim for refund of said \$230.15 plus interest, which claim was rejected and refused by said Director on March 21, 1955, all to the damage of plaintiffs in the sum of \$230.15 plus interest.

Second Supplemental Count

As and for a second supplemental count plaintiffs complain of the United States of America and allege as follows:

I.

Reallege as if set forth here in haec verba Paragraphs I, II and III of plaintiffs' amended complaint.

II.

That for the calendar year 1953 plaintiffs overpaid their income taxes by the amount of \$276.46.

III.

That \$46.31 of said overpayment was assessed and applied to payment of alleged penalties on plaintiffs' income tax for the calendar year 1951, that said assessment, collection and application was erroneously and illegally made for the reason that plaintiffs fully and timely paid their income taxes for the calendar year 1951 and no penalties were due or payable or properly assessable.

IV.

That on February 23, 1955, plaintiffs filed with the Director of Internal Revenue at Reno, Nevada, a claim for refund of said \$46.31 plus interest, which claim was rejected and refused by said Director on March 21, 1955, all to the damage of plaintiffs in the sum of \$46.31 plus interest. [21]

Third Supplemental Count

As and for a third supplemental count plaintiffs complain of the United States of America and allege as follows:

I.

That jurisdiction of this action and count is conferred by Section 1346 (a) (1) of Title 28 of the United States Code.

II.

That plaintiff Mervin L. Gardner is a citizen of the United States and resides at the City of Reno and State of Nevada.

III.

That this action and count is one to recover an Internal Revenue penalty collected without authority and wrongfully collected.

IV.

That on or about July 13, 1953, plaintiff Mervin L. Gardner was assessed Thirty-seven Thousand Three Hundred Ninety-two Dollars Seventy-seven Cents (\$37,392.77) by V. W. Evans, Director of Internal Revenue for the District of Reno, as a penalty under Section 2707 (a) of the Internal Revenue Code of 1939; said assessment being made against plaintiff Mervin L. Gardner as an officer of Gardner Supply Company, Inc., a corporation, for wilful failure to pay withholding taxes and F.I.C.A. taxes of said corporation.

V.

That plaintiff Mervin L. Gardner did not wilfully fail to pay, collect, or truthfully account for and pay over the said withholding taxes or F.I.C.A. taxes and did not wilfully attempt in any manner to evade or defeat any such taxes or the payment thereof.

VI.

That previous to the date hereof said plaintiff entered into a contract with the Sierra Ordnance

Depot, a facility of the United States Army; that said plaintiff performed said contract and was paid in part; that said plaintiff was not paid the final sum [22] of Seven Thousand Seven Hundred Ninety Dollars Seventy-eight Cents (\$7,790.78) due to said plaintiff, but instead said sum was paid by the United States Army to the United States Treasury Department and applied in part payment of the aforesaid penalty without said plaintiff's consent and against such plaintiff's wishes.

VII.

That on or about May 1, 1955, said plaintiff filed with said District Director a claim for refund of said \$7,790.78, a copy of which claim is attached hereto and made a part hereof as if set forth in haec verba, that said claim of refund has been refused by reason of the fact that more than six months have elapsed since the filing of said claim and said claim has not been allowed.

VIII.

That by reason of the foregoing, said plaintiff has been damaged in the sum of \$7,790.78 plus interest.

Wherefore, plaintiffs pray judgment may be entered herein in favor of plaintiffs and against defendant for:

1. \$1,881.40 plus interest on plaintiffs' amended complaint.

2. \$230.15 plus interest on plaintiffs' first supplemental count.

3. \$46.31 plus interest on plaintiffs' second supplemental count.

4. \$7,790.78 plus interest on plaintiffs' third supplemental count.

5. Costs of suit and such other and further relief as to the court may seem just.

Dated: This 30th day of November, 1955.

/s/ ROYAL A. STEWART,

/s/ RICHARD W. HORTON,

Attorneys for Plaintiffs. [23]

Demand for Jury

Plaintiffs hereby demand a trial by jury of all issues triable by jury upon the trial of the above-entitled action.

/s/ ROYAL A. STEWART,

/s/ RICHARD W. HORTON,

Attorneys for Plaintiffs. [24]

EXHIBIT "B"

Withholding Statement—1952

Wages Paid and Income and F.I.C.A.

Taxes Withheld

Employee's Copy (Duplicate)

Employee to Whom Paid—(Print name, full address, and Social Security account number):

Mervin L. Gardner,
2345 Arlington Ave.,
Reno, Nevada.
530-09-2427

Federal Insurance Contributions Act

Total F.I.C.A. wages (before payroll deductions)
paid in 1952.....\$12,750.00
F.I.C.A. employee tax withheld, if any.....\$54.00

Information for Income Tax Return

Total wages (before payroll deductions) paid in
1952\$12,750.00
Federal income tax withheld, if any.....\$2047.20

Employer by Whom Paid (Name, address, and identification number):

Gardner Supply Co.,
750 E. Fifth St.,
Reno, Nevada.
88-0056814

Withholding Statement—1952

Wages Paid and Income and F.I.C.A.
Taxes Withheld

Employee's Copy (Duplicate)

Employee to Whom Paid—(Print name, full address, and Social Security account number):

Myrtle G. Gardner,
2345 Arlington Ave.,
Reno, Nevada.
530-20-0838

Federal Insurance Contributions Act

Total F.I.C.A. wages (before payroll deductions)
paid in 1952\$1275.00
F.I.C.A. employee tax withheld, if any.....\$19.13

Information for Income Tax Return

Total wages (before payroll deductions) paid in
1952\$1275.00
Federal income tax withheld, if any.....\$255.00

Employer by Whom Paid (Name, address, and identification number):

Gardner Supply Co.,
750 E. Fifth St.,
Reno, Nevada.
88-0056814

(Copy)

Form 843

U. S. Treasury Department

Internal Revenue Service

(Revised July 1953)

Claim

To Be Filed With the District Director Where
Assessment Was Made or Tax Paid

District Director's Stamp: [Blank]

The District Director will indicate in the block below the kind of claim filed, and fill in, where required, the certificate on the back of this form.

- ☐ Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

Name of taxpayer or purchaser of stamps:

Mervin L. Gardner.

Street address: 2345 Arlington Avenue.

City, postal zone number, and State: Reno, Nevada.

1. District in which return (if any), was filed:
Nevada.

* * *

3. Kind of tax: WT-FICA (6-53-540-0).

4. Amount of assessment: \$37,392.77.

* * *

6. Amount to be refunded: \$7,790.78.

* * *

The claimant believes that this claim should be allowed for the following reasons:

Taxpayer did not wilfully fail to pay, collect, or truthfully account for and pay over taxes withheld or F.I.C.A. taxes, and did not wilfully attempt in any manner to evade or defeat any such taxes or the payment thereof, and is not otherwise subject to the tax or penalty assessed and collected.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

/s/ MERVIN L. GARDNER.

Dated April 28, 1955.

[Endorsed]: Filed December 14, 1955. [25]

[Title of District Court and Cause.]

ANSWER TO SECOND AMENDED AND
SUPPLEMENTAL COMPLAINT

The defendant by its attorney, Franklin P. Rittenhouse, United States Attorney for the District of Nevada, answers the plaintiffs' complaint as follows:

Amended Complaint
First Defense

The defendant hereby moves the Court that the second amended complaint filed herein should be

dismissed on the ground that the Court has no jurisdiction over the subject matter of this cause, the grounds for this motion appearing more fully in the defendant's motion to dismiss filed with the Court on June 29, 1955, and the defendant hereby incorporates the grounds of the said motion to dismiss, the same as though set forth and restated in full herein.

Supplemental Complaint
First Supplemental Count and
Second Supplemental Count
Second Defense

The defendant hereby moves the Court that the First Supplemental Count and Second Supplemental Count of the Second Amended and Supplemental Complaint filed herein should be dismissed on the ground that the Court has no jurisdiction over the subject matter of this cause, the grounds for this motion appearing more [26] fully in the defendant's motion to dismiss filed with the Court on June 29, 1955, and the defendant hereby incorporates the grounds of the said motion to dismiss, the same as though set forth and restated in full herein.

Third Supplemental Count

1. The defendant admits the allegations contained in Paragraph I.
2. The defendant admits the allegations contained in Paragraph II.
3. The defendant denies the allegations contained in Paragraph III.

4. The defendant is without sufficient information at this time to form a belief as to the truth of the allegations of Paragraph IV, except to admit that the Commissioner of Internal Revenue assessed penalties under Section 2707 (a) of the Internal Revenue Code of 1939 against the plaintiff Mervin L. Gardner, 750 East 5th Street, Reno, Nevada.

5. The defendant denies the allegations contained in Paragraph V.

6. The defendant is without sufficient information at this time to form a belief as to the truth of the allegations of Paragraph VI.

7. The defendant is without sufficient information at this time to form a belief as to the truth of the allegations of Paragraph VII.

8. The defendant denies the allegations contained in Paragraph VIII.

Wherefore, the defendant having answered, prays that judgment be entered dismissing the plaintiff's complaint with prejudice, and that the defendant be awarded its costs and other relief which to the Court may seem just and proper.

FRANKLIN RITTENHOUSE,
United States Attorney:

By /s/ STANLEY H. BROWN,
Assistant U. S. Attorney,
District of Nevada.

[Endorsed]: Filed January 4, 1956. [27]

[Title of District Court and Cause.]

ORDER GRANTING MOTION OF
DISMISSAL, IN PART

The above-entitled matter came before the Court this 12th day of March, 1956, on the Government's motion for dismissal, Richard W. Horton appearing for the plaintiff, and Stanley H. Brown, Assistant United States Attorney, appearing for the Government, and the matter being argued in chambers on stipulation of counsel, and being fully considered by the Court; and it appearing that this Court lacks jurisdiction to hear and determine plaintiff's amended complaint, first supplemental count and second supplemental count; now, therefore, it is

Ordered, that said amended complaint, first supplemental count, and second supplemental count, be and the same are hereby dismissed.

Dated at Carson City, Nevada, this 12th day of March, 1956.

/s/ JOHN R. ROSS,

United States District Judge.

[Endorsed]: Filed March 12, 1956. [28]

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Plaintiff Mervin L. Gardner moves the Court, pursuant to Rule 56 of the Federal Rules of Civil

Procedure, to enter judgment for said plaintiff for the relief demanded on the Third Supplemental Count of the Complaint on file herein, on the ground that there is no genuine issue as to any material fact in this action and that said plaintiff is entitled to judgment as a matter of law, as appears from the pleadings on file herein and the affidavits attached hereto and made a part hereof.

Dated: This 14th day of March, 1956.

/s/ ROYAL A. STEWART,

/s/ RICHARD W. HORTON,
Attorneys for Plaintiffs.

[Endorsed]: Filed March 15, 1956. [29]

[Title of District Court and Cause.]

AFFIDAVIT

State of Nevada,
County of Washoe—ss.

Mervin L. Gardner, being first duly sworn, deposes and says:

1. That he is one of the plaintiffs in the above-entitled action.

2. That Plaintiffs' Third Supplemental Count in Plaintiffs' Complaint is one to recover an Internal Revenue penalty collected without authority and wrongfully collected.

3. That on or about July 13, 1953, affiant was assessed \$37,392.77 by V. W. Evans, Director of Internal Revenue for the District of Reno, as a penalty under Section 2707 (a) of the Internal Revenue Code of 1939; that said assessment was made against affiant as an officer of Gardner Supply Company, Inc., a corporation, for wilful failure to pay withholding taxes and F. I. C. A. taxes of said corporation; that said taxes were due as follows:

Fourth Quarter 1951—Wt. F. I. C. A. \$9,935.96

First Quarter 1952—Wt. F. I. C. A. 8,621.15

Second Quarter 1952—Wt. F. I. C. A. 6,715.74

Third Quarter 1952—Wt. F. I. C. A. 6,208.05

4. That previous to the commencement of the above-entitled action, defendant became indebted to affiant in the sum of \$7,790.78 for labor and materials supplied by affiant to defendant [30] at the Sierra Ordnance Depot; that defendant has wrongfully applied said \$7,790.78 to partial payment of said penalty without affiant's consent and against affiant's wishes.

5. That on or about May 1, 1955, affiant filed with said District Director a claim for refund of said \$7,790.78, a copy of which claim is attached to the original complaint on file herein; that more than six (6) months elapsed between the filing of said claim and the filing of plaintiffs' Third Supplemental Count herein.

6. That affiant did not wilfully fail to pay, collect, or truthfully account for and pay over the

said withholding taxes or F. I. C. A. taxes and did not wilfully attempt in any manner to evade or defeat any such taxes or the payment thereof.

a. That Walter Seegers was employed by said Gardner Supply Company, Inc. as auditor and that Ruth Walsh was employed by said corporation as bookkeeper.

b. That it was the business practice of said corporation to have the auditor make out the checks and the bookkeeper sign the checks for payment of corporate obligations.

c. That affiant instructed said auditor to make checks to pay the withholding and F. I. C. A. taxes for the fourth quarter of 1951 and the first and second quarters of 1952 and to make the proper reports.

d. That said auditor made the required reports for said quarters but, unknown to your affiant, did not make payment of taxes, as said corporation did not have sufficient funds to pay said taxes.

e. That your affiant knew said corporation was short of funds, but did not realize that said taxes had not been paid.

f. That on August 3, 1951, affiant borrowed \$10,295.00 upon his personal life insurance with Penn Life Insurance Co., which sum was loaned to said corporation and used to pay \$6,525.80 [31] due on corporate withholding taxes and \$1,794.30 on corporate social security taxes, said payments being

made to the Collector of Internal Revenue on August 18, 1951.

g. That on February 20, 1952, affiant secured a loan from his brother, P. K. Gardner, to the corporation, of \$3,255.82, personally guaranteed by affiant to pay the current payroll of said corporation.

h. That on February 21, 1952, affiant loaned \$100.00 to said corporation and on February 23, 1952, affiant loaned \$4,000.00 to said corporation to pay the current payroll of said corporation; that said loans practically exhausted affiant's personal resources.

i. That during the latter part of 1951 and up to September 16, 1952, said corporation was operating on borrowed capital, had assigned the proceeds of its jobs to its lenders as security for said loans, and all through said period of time was on the narrow edge of bankruptcy.

j. That the fourth quarter of 1951 taxes were payable in January, 1952, at the end of which month said corporation had written checks for \$7,673.27 more than was in the bank.

k. That the first quarter of 1952 taxes were payable in April, 1952, at the end of which month said corporation had written checks for \$2,382.34 more than was in the bank.

l. That the second quarter of 1952 taxes were payable in July, 1952, at the end of which month

said corporation had written checks for \$3,045.46 more than was in the bank.

m. That the third quarter of 1952 taxes were payable in October, 1952; that on September 16, 1952, before the last month of the third quarter of 1952 expired, said corporation went into receivership and your affiant no longer had any control over the affairs of said corporation; that it was legally and factually impossible for affiant to pay the withholding and F.I.C.A. taxes [32] for the third quarter of 1952, even had said corporation had the ability to pay.

n. That from the first of 1952 to August 31, 1952, said corporation had an operating loss of \$217,458.20.

o. That on December 31, 1950, said corporation had demand notes outstanding in the amount of \$209,000.00; on December 31, 1951, \$296,192.50 outstanding, and on September 16, 1952, the day said corporation went into receivership, \$234,441.64 was outstanding; that the reduction in notes receivable between December 31, 1951, and September 16, 1952, was occasioned by the receipt by the corporate creditors of amounts assigned to said creditors prior to the fourth quarter of 1951; that said demand notes were payable out of the earnings of said corporation as soon as said earnings were realized.

7. That the withholding and F.I.C.A. taxes here involved could have been paid only if said corpora-

tion had borrowed additional funds, and the assets of said corporation and of your affiant were completely pledged on previous loans; that your affiant guaranteed the loans to said corporation in an effort to keep said corporation solvent, and is still paying off said corporate obligations to the best of his ability.

8. That as a result of the loans made by Affiant to said corporation and of affiant drawing less than his agreed wage from said corporation, said corporation was indebted to affiant in the amount of \$6,814.30 on September 16, 1952, the date said corporation went into receivership, as reflected by the drawing account of affiant on the books of said corporation; that the books of said corporation were audited in said receivership and said drawing account found to be proper; that said receivership was administered by the above-entitled Court.

/s/ MERVIN L. GARDNER,
Affiant.

Subscribed and Sworn to before me this 14th day of March, 1956.

[Seal] /s/ RICHARD W. HORTON,
Notary Public in and for said
County and State.

My Commission Expires 12-18-57.

[Endorsed]: Filed March 15, 1956. [33]

[Title of District Court and Cause.]

CROSS MOTION FOR SUMMARY
JUDGMENT

To Stuart and Horton, Attorneys at Law, 131 West
2nd Street Reno, Nevada, Attorneys for Plain-
tiffs.

Please Take Notice that upon the hearing of the
plaintiffs' Motion for Summary Judgment herein,
defendant will move this court for Summary Judg-
ment in its favor on the ground that the admissions
contained in the plaintiffs' Affidavit in support of
their Motion for Summary Judgment entitled de-
fendant to judgment in its favor as a matter of
law.

As indicated in the Affidavit submitted in opposi-
tion to the plaintiffs' Motion, by this Cross Motion
defendant does not concede that there are no dis-
puted issues of material fact in this action to sup-
port any judgment for the plaintiffs.

FRANKLIN RITTENHOUSE,
United States Attorney;

By /s/ STANLEY H. BROWN,
Assistant United States At-
torney. [34]

[Title of District Court and Cause.]

AFFIDAVIT

State of Nevada,
County of Washoe—ss.

Homer H. Forrester, being first duly sworn, deposes and says:

1. That he is the Chief of the Delinquent Accounts and Returns Branch, and as such has custody of the pertinent files and records in the office of the District Director of Internal Revenue, Reno, Nevada.

2. That he had personally examined and is familiar with these records and has supervised the investigation into the affairs of the Gardner Supply Company, Inc. and Mervin L. Gardner, their records and the records of third parties having business transactions with them.

3. That on the basis of his personal knowledge and on the records of the office of the District Director made in the regular course of its investigations into the liabilities herein, affiant states that:

(a) Mervin L. Gardner was in complete control of all phases of the operations of the Gardner Supply Company, Inc. during the times covered by the assessments herein and had full knowledge of the financial and tax affairs of the Gardner Supply Company, Inc.

(b) That Mervin L. Gardner was personally contacted by the office of the District Director on

numerous occasions during the period the liability herein arose with repeated demands for payment by the Gardner Supply Company, Inc. of its taxes and he admitted knowledge of the corporation's liabilities.

(c) That although he had knowledge that the corporation was not paying or making provision for the paying over to the District Director of the Withholding and employment taxes, Mr. Gardner, in control of the affairs of the Gardner Supply Company, Inc., continued to employ labor on behalf of the corporation during the fourth quarter of 1951 and during the first, second, and third quarters of 1952 and to pay such labor, and he knowingly and wilfully failed to pay, collect, or truthfully account for and pay over the withholding and employment taxes that had been or should have been withheld from such labor payments and which should have been paid over to the defendant.

(d) Mervin L. Gardner was at all times aware of the financial condition of the Gardner Supply Company, Inc. and the availability and disposition of its funds.

(e) The money withheld was used and diverted to pay other expenses of the Gardner Supply Company, Inc. and Mervin L. Gardner individually.

(f) The assessments herein were properly made and any monies collected thereon properly collected. These assessments were made on or about July 1,

1953, and the total amount of the assessments was \$38,781.63 plus statutory additions.

(g) Without admitting any of the other allegations in the affidavit, he denies knowledge of the self-serving allegations in paragraph 6 of the plaintiffs' Affidavit, and denies particularly the allegations in paragraph 6c, d and e, and paragraphs 7 and 8 thereof.

/s/ HOMER H. FORRESTER.

Subscribed and sworn to before me this 27 day of April, 1956.

[Seal] /s/ D. B. STEWART.

My Commission Expires May 26, 1959.

[Endorsed]: Filed April 28, 1956.

In the District Court of the United States
for the District of Nevada

No. 1210

MERVIN L. GARDNER and MYRTLE G
GARDNER, His Wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA.

Defendant.

ORDER FOR SUMMARY JUDGMENT

This cause came on to be heard on the motion of plaintiff Mervin L. Gardner for a summary judg-

ment as authorized by Rule 56 of the Federal Rules of Civil Procedure, and it appearing to the Court from the affidavits of Mervin L. Gardner and Homer H. Forrester, from the stipulations of the parties, and from the pleadings that there is no genuine issue as to any material fact and that plaintiff Mervin L. Gardner is entitled to a judgment as a matter of law:

It Is Therefore Ordered, Adjudged and decreed that summary judgment be entered in favor of plaintiff Mervin L. Gardner and against defendant for the sum of \$7,790.78 together with interest thereon at the rate of six per cent (6%) per annum from the date of collection to a date preceding the date of the [35] refund check by not more than thirty days as provided by Title 28, Sec. 2411 U. S. Code Annotated.

Dated: This 2nd day of May, 1956.

/s/ JOHN R. ROSS,

United States District Judge.

[Endorsed]: Filed May 2, 1956. [36]

[Title of District Court and Cause.]

DOCKET ENTRIES

Docket Entry of May 1, 1956

Entg. judgment. Judgment: Ordered that plaintiff's motion for summary judgment be, and the same hereby is, granted.

Counsel notified of above entry.

Docket Entry of May 28, 1956

Entg. Judgment in accordance with above order. Judgment: It Is Therefore Ordered, Adjudged and Decreed that summary judgment be entered in favor of plaintiff Mervin L. Gardner and against defendant for the sum of \$7,790.78 together with interest thereon at the rate of six per cent (6%) per annum from the date of collection to a date preceding the date of the refund check by not more than thirty days as provided by Title 28, Sec. 2411, U. S. Code Annotated.

Counsel notified of above entry.

(A true copy.) [37]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that United States of America, defendant above named, hereby appeals to the United States Court of Appeals for the

Ninth Circuit from the Summary Judgment entered in the above-entitled action in favor of plaintiffs and against defendant on the 1st day of May, 1956.

Dated: This 26th day of June, 1956.

FRANKLIN RITTENHOUSE,
United States Attorney;

By /s/ STANLEY H. BROWN,
Assistant U. S. Attorney.

[Endorsed]: Filed June 27, 1956. [38]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
AND DOCKETING RECORD ON APPEAL

Upon motion of defendant, and good cause appearing:

It Is Hereby Ordered, pursuant to Rule 73 (g) of the Federal Rules of Civil Procedure, that the time for filing and docketing the record on appeal in the above-entitled matter be, and it hereby is, extended to and including the 25th day of September, 1956.

Dated this 1st day of August, 1956.

/s/ JAMES R. ROSS,
United States District Judge.

[Endorsed]: Filed August 1, 1956. [39]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Comes Now the defendant-appellant, United States of America, and designates the portions of the record and proceedings to be contained in the record on appeal herein:

The defendant-appellant hereby designates the entire record herein, including the docket entries and all pleadings, stipulations, motions, orders and the judgment as entered.

Dated this 10th day of September, 1956.

FRANKLIN RITTENHOUSE,
United States Attorney;

By /s/ STANLEY H. BROWN,
Assistant U. S. Attorney.

Service of the foregoing Designation is hereby admitted this 10th day of September, 1956.

/s/ RICHARD W. HORTON,
Attorneys for Plaintiffs.

[Endorsed]: Filed September 11, 1956. [40]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, Oliver F. Pratt, Clerk of the United States

District Court for the District of Nevada, do hereby certify that the accompanying documents, listed in the attached index, are the originals filed in this court, or true and correct copies of orders or judgments entered on the docket of this court, in the above-entitled case, and that they constitute the record on appeal herein as designated by the parties.

In Witness Whereof, I have hereunto set my hand and affixed the seal of District Court this 18th day of September, A. D. 1956.

[Seal] /s/ OLIVER F. PRATT,
Clerk. [41]

[Endorsed]: No. 15291. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Mervin L. Gardner and Myrtle G. Gardner, His Wife, Appellees, Transcript of Record. Appeal from the United States District Court for the District of Nevada.

Filed September 19, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15291

UNITED STATES OF AMERICA,

Defendant-Appellant,

vs.

MERVIN L. GARDNER and MYRTLE G.
GARDNER, His Wife,

Plaintiffs-Appellees.

STATEMENT OF POINTS TO BE
RELIED UPON ON APPEAL

Comes now the United States of America, Appellant in the above-mentioned proceeding by and through its attorney of record, Franklin P. R. Rittenhouse, United States Attorney in and for the District of Nevada, and hereby states that it extends to rely upon the following points in this appeal:

The District Court erred:

1. In deciding the issue in this proceeding in favor of the plaintiffs.
2. In granting the motion of plaintiff Mervin L. Gardner for summary judgment.
3. In failing and refusing to grant defendant's motion for summary judgment.

4. In entering summary judgment in favor of plaintiff Mervin L. Gardner.

5. In failing and refusing to enter judgment for the defendant dismissing the complaint.

6. In holding and deciding that the plaintiff, Mervin L. Gardner is not liable for the penalty imposed by Section 2707 (a) of the Internal Revenue Code of 1939 for wilful failure to pay, collect, or truthfully account for and pay over withholding and unemployment taxes assessed against the Gardner Supply Company, Inc. for the fourth quarter of 1951 and the first three quarters of 1952.

7. In failing and refusing to hold and decide that there are material issues of fact which can be resolved only by trial of this cause on its merits.

8. In that its holding and decision are not supported by, but are contrary to the facts revealed by the pleadings and affidavits on file, and

9. That its holding and decision are contrary to law.

/s/ FRANKLIN RITTENHOUSE,
United States Attorney.

Service of copy admitted.

[Endorsed]: Filed September 20, 1956.

[Title of Court of Appeals and Cause.]

DESIGNATION OF PORTIONS OF
RECORD TO BE PRINTED

Pursuant to Rule 75 of the Federal Rules of Civil Procedure and Rule 17 of the Rules of this Court, appellant hereby designates the following parts of the record on appeal to be printed:

1. All docket entries.
2. Stipulation filed December 14, 1955, that plaintiff may file a second amended and supplemental complaint and that defendant may have twenty days to answer.
3. Second amended and supplemental complaint filed December 14, 1955.
4. Answer to second amended and supplemental complaint filed January 4, 1956.
5. Order granting defendant's motion of dismissal, in part, filed and entered March 12, 1956.
6. Motion of the plaintiff, Mervin L. Gardner, for summary judgment filed March 15, 1956.
7. Affidavit of Mervin L. Gardner filed March 15, 1956, in support of the motion for summary judgment.
8. Cross motion for summary judgment by the defendant and attached affidavit of H. H. Forrester filed April 28, 1956.

9. Order granting the motion for summary judgment of plaintiff Mervin L. Gardner entered May 1, 1956.

10. Judgment for plaintiff Mervin L. Gardner entered May 28, 1956.

11. Defendants' notice of appeal filed June 27, 1956.

12. Order extending time to transmit record filed August 1, 1956.

13. Defendant's designation of entire record for transmittal to the Court of Appeals for the Ninth Circuit filed September 19, 1956.

14. Statement of points to be relied upon by appellant.

15. This designation.

/s/ FRANKLIN RITTENHOUSE,
United States Attorney.

Service of copy admitted.

[Endorsed]: Filed September 20, 1956.

No. 15291

**In the United States Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

v.

**MERVIN L. GARDNER AND MYRTLE G. GARDNER, HIS
WIFE, APPELLEES**

**ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF NEVADA**

BRIEF FOR THE APPELLANT

CHARLES K. RICE,
Assistant Attorney General,

A. F. PRESOTT,
HELEN A. BUCKLEY,

Attorneys,

Department of Justice, Washington 25, D. C.

FRANKLIN RITTENHOUSE,
United States Attorney.

STANLEY H. BROWN,
Assistant United States Attorney.

FILED

FEB 21 1957

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15291

UNITED STATES OF AMERICA, APPELLANT

v.

MERVIN L. GARDNER AND MYRTLE G. GARDNER, HIS
WIFE, APPELLEES

*ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF NEVADA*

BRIEF FOR THE APPELLANT

OPINION BELOW

The District Court did not render an opinion in granting the taxpayers' motion for summary judgment.

JURISDICTION

This appeal involves an assessment for willful failure to pay federal withholding and employment taxes made on or about July 13, 1953. (R. 9.) Thereafter the balance due the taxpayer on a contract with the United States Army was paid by the United States Army to the United States Treasury Department and applied in part payment of the assessment. Claim for refund was filed on May 1, 1955, and was rejected by not allowing the claim within six months

after it was filed. (R. 10.) Within the time provided in Section 6532 of the Internal Revenue Code of 1954 and on December 14, 1955, the taxpayer brought an action in the District Court for recovery of the taxes paid. (R. 3-15.) Jurisdiction was conferred on the District Court by 28 U. S. C., Section 1346. An order for summary judgment in favor of the taxpayer was entered on May 28, 1956. (R. 30.) Within sixty days and on June 27, 1956, a notice of appeal was filed. (R. 30-31.) Jurisdiction is conferred on this Court by 28 U. S. C., Section 1291.

QUESTIONS PRESENTED

1. Whether the District Court erred in granting the taxpayer's motion for a summary judgment when material issues of fact, the question of the taxpayer's knowledge of his corporation's failure to pay over withholding and employment taxes, and the willful nature of the taxpayer's failure to pay such taxes, were put into controversy.

2. If the allegation of the taxpayer that he was unaware that the taxes were not paid according to his instructions is immaterial in view of the later admissions of the taxpayer to complete knowledge of the financial condition of his corporation, whether the District Court erred in granting summary judgment for the taxpayer and thus holding as a matter of law that the taxpayer was not liable for the penalty imposed by Section 2707 (a) of the Internal Revenue Code of 1939 for willful failure to pay, collect, or truthfully account for and pay over withholding and employment taxes, where under the admissions in the

taxpayer's affidavit it was clear that the taxpayer was in complete control of the corporation, was aware that such taxes were not paid, and intentionally did not pay such taxes because the corporation was in poor financial condition, instead diverting the withheld taxes to other uses.

3. In view of the admissions of the taxpayer to complete knowledge of the financial affairs of the corporation, whether the District Court erred in refusing to grant the cross-motion of the United States for summary judgment.

STATUTE AND RULE INVOLVED

Internal Revenue Code of 1939:

CHAPTER 9—EMPLOYMENT TAXES

SUBCHAPTER A—EMPLOYMENT BY OTHERS THAN CARRIERS

PART I—TAX ON EMPLOYEES

* * * * *

SEC. 1430 [As amended by Sec. 903, Social Security Act Amendments of 1939, c. 666, 53 Stat. 1360]. OTHER LAWS APPLICABLE.

All provisions of law, including penalties, applicable with respect to any tax imposed by section 2700 or section 1800, and the provisions of section 3661 shall, insofar as applicable and not inconsistent with the provisions of this subchapter, be applicable with respect to the taxes imposed by this subchapter.

(26 U. S. C. 1952 ed., Sec. 1430.)

SUBCHAPTER D—COLLECTION OF INCOME TAX AT SOURCE ON WAGES

[As added by Sec. 2 (a), Current Tax Payment
Act of 1943, c. 120, 57 Stat. 126]

* * * *

SEC. 1627. OTHER LAWS APPLICABLE.

All provisions of law, including penalties, applicable with respect to the tax imposed by section 1400 shall, insofar as applicable and not inconsistent with the provisions of this subchapter, be applicable with respect to the tax under this subchapter.

(26 U. S. C. 1952 ed., Sec. 1627.)

CHAPTER 25—FIREARMS

SUBCHAPTER A—PISTOLS AND REVOLVERS

* * * *

SEC. 2707. PENALTIES.

(a) Any person who willfully fails to pay, collect, or truthfully account for and pay over the tax imposed by section 2700 (a), or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty of the amount of the tax evaded, or not paid, collected, or accounted for and paid over, to be assessed and collected in the same manner as taxes are assessed and collected. No penalty shall be assessed under this subsection for any offense for which a penalty may be assessed under authority of section 3612.

* * * *

(d) The term "person" as used in this section includes an officer or employee of a cor-

poration, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

(26 U. S. C. 1952 ed., Sec. 2707.)

Federal Rules of Civil Procedure:

Rule 56 [as amended December 27, 1946].

SUMMARY JUDGMENT.

* * * * *

(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT

The District Court granted the motion of the taxpayers for summary judgment. (R. 28-29.) From this judgment the United States here appeals. (R. 30-31.)

The taxpayers in the Third Supplemental Count to their amended complaint (R. 8) and the United States in its answer (R. 16) show in substance allegations and denials as follows:¹

¹The action herein concerns only the Third Supplemental Count (R. 8) of the taxpayers' amended complaint. The amended complaint, First Supplemental Count and Second Supplemental

The action is one to recover an Internal Revenue penalty collected without authority and wrongfully collected. (R. 9.) This was denied by the United States in its answer. (R. 16.)

On or about July 13, 1953, the taxpayer Mervin L. Gardner² was assessed \$37,392.77 as a penalty under Section 2707 (a) of the Internal Revenue Code of 1939, the assessment being made against the taxpayer as an officer of Gardner Supply Company, Inc., a corporation (hereinafter referred to as the corporation), for willful failure to pay withholding taxes and F. I. C. A. taxes of the corporation. (R. 9.) In its answer the United States admitted that the assessment under Section 2707 (a) was made against the taxpayer, and stated that it was without sufficient information to form a belief as to the truth of the other allegations in the paragraph. (R. 17.)

The taxpayer did not willfully fail to pay, collect, or truthfully account for and pay over the withholding taxes or F. I. C. A. taxes and did not willfully attempt in any manner to evade or defeat any such taxes or the payment thereof. (R. 9.) This was denied by the United States. (R. 17.)

The taxpayer entered into a contract with the Sierra Ordnance Depot, a facility of the United States Army, performed the contract and was paid in part. The taxpayer was not

Count (R. 4-8) were dismissed for lack of jurisdiction in the District Court (R. 18).

² The taxpayers herein are Mervin L. Gardner and his wife Myrtle G. Gardner. Since the assessment was against the husband taxpayer as an officer of the corporation, future references to "taxpayer" refer to the husband.

paid the final sum of \$7,790.78 due but instead this amount was paid by the United States Army to the United States Treasury Department and applied in part payment of the above penalty without the taxpayer's consent and against the taxpayer's wishes. (R. 9-10.) The answer stated the United States to be without sufficient information to form a belief as to the truth of these allegations. (R. 17.)

The taxpayer moved for a summary judgment on the ground that there was no genuine issue as to any material fact and that the taxpayer was entitled to judgment as a matter of law, and attached an affidavit in support of such motion. (R. 18-19.) In this affidavit, the taxpayer averred in material part as follows:

The penalty assessment was made against the taxpayer as an officer of the corporation, for willful failure to pay withholding taxes and FICA taxes of the corporation, and the taxes were due in the fourth quarter of 1951 and the first three quarters of 1952. (R. 20.)

The United States was indebted to the taxpayer in the sum of \$7,790.78 and this sum was wrongfully applied to partial payment of the penalty without the taxpayer's consent and against his wishes. (R. 20.)

On or about May 1, 1955, a claim for refund of \$7,790.78 was filed and more than six months elapsed between the filing of the claim and the filing of the taxpayer's Third Supplemental Count. (R. 20.)

The taxpayer did not willfully fail to pay, collect, or truthfully account for and pay over the withholding taxes or FICA taxes and did

not willfully attempt in any manner to evade or defeat such taxes or the payment thereof. (R. 20-21.)

It was the business practice of the corporation to have the auditor make out the checks and the bookkeeper sign the checks for payment of corporate obligations. The taxpayer instructed the auditor to make checks to pay the withholding and FICA taxes for the fourth quarter of 1951 and the first and second quarters of 1952 and to make the proper reports. The auditor made the required reports, but, unknown to the taxpayer, did not make payment of taxes as the corporation did not have sufficient funds to pay the taxes. The taxpayer knew that the corporation was short of funds but did not realize that the taxes had not been paid. (R. 21.)

On August 3, 1951, the taxpayer borrowed \$10,295 upon his personal life insurance and loaned this amount to the corporation to pay \$6,525.80 due on corporate withholding taxes and \$1,794.30 on corporate social security taxes. These payments were made on August 18, 1951. On February 20, 1952, the taxpayer secured a loan from his brother to the corporation of \$3,255.82 to pay the current payroll of the corporation, and the taxpayer personally guaranteed this loan. On February 21, 1952, taxpayer loaned \$100 and on February 23, 1952, \$4,000 to the corporation to pay the current payroll of the corporation. These loans practically exhausted the taxpayer's personal resources. (R. 21-22.)

Taxes for the fourth quarter of 1951 were payable in January, 1952, at the end of which

month the corporation had written checks for \$7,673.27 more than was in the bank. Taxes for the first quarter of 1952 were payable in April, 1952, at the end of which month the corporation had written checks for \$2,382.34 more than was in the bank. Taxes for the second quarter of 1952 were payable in July, 1952, at the end of which month the corporation had written checks for \$3,045.46 more than was in the bank. (R. 22-23.)

Taxes for the third quarter of 1952 were payable in October, 1952. On September 16, 1952, the corporation went into receivership and the taxpayer no longer had any control over the affairs of the corporation. It was legally and factually impossible for the taxpayer to pay the withholding and FICA taxes for the third quarter of 1952, even had the corporation had the ability to pay. (R. 23.)

From the first of 1952 to August 31, 1952, the corporation had an operating loss of \$217,458.20. (R. 23.)

On December 31, 1950, outstanding demand notes of the corporation were \$209,000; on December 31, 1951, \$296,192.50; on September 16, 1952, the day the corporation went into receivership, \$234,441.64. The reduction in notes receivable between December 31, 1951, and September 16, 1952, was occasioned by the receipt by the corporate creditors of amounts assigned prior to the fourth quarter of 1951. The demand notes were payable out of the earnings of the corporation as soon as the earnings were realized. (R. 23.)

The withholding and F. I. C. A. taxes here involved could have been paid only if the cor-

poration had borrowed additional funds, and the assets of the corporation and of the taxpayer were completely pledged on previous loans. The taxpayer guaranteed the loans to the corporation in an effort to keep the corporation solvent and is still paying off the corporation obligations to the best of his ability. (R. 23-24.)

As a result of the loans made by the taxpayer to the corporation and of the taxpayer drawing less than his agreed wage from the corporation, the corporation was indebted to the taxpayer in the amount of \$6,814.30 on September 16, 1952, the date the corporation went into receivership. This amount was shown on the taxpayer's drawing account on the books of the corporation, and these books had been audited in the receivership and the drawing account found to be correct. (R. 24.)

Thereupon, the United States moved the court for summary judgment in its favor as a matter of law. By the cross motion, however, the United States specifically did not concede that there were no disputed issues of material fact in the action to support any judgment for the taxpayers. (R. 25.) An affidavit in support of the cross motion was filed by Homer H. Forrester, Chief of the Delinquent Accounts and Returns Branch of the Internal Revenue Service. (R. 26-28.) In substance, this affidavit stated as follows:

The affiant had personally examined and is familiar with the pertinent files and records in the office of District Director of Internal Revenue and has supervised the investigation into

the affairs of the corporation and the taxpayer, their records and the records of third parties having business transactions with them. (R. 26.)

The taxpayer was in complete control of all phases of the operations of the corporation during the times covered by the assessments and had full knowledge of the financial and tax affairs of the corporation. The taxpayer was personally contacted by the office of the District Director on numerous occasions during the period the liability herein arose with repeated demands for payment by the corporation of its taxes and he admitted knowledge of the corporation's liabilities. Although the taxpayer had knowledge that the corporation was not paying or making provision for the paying of the withholding and employment taxes, the taxpayer continued to employ labor on behalf of the corporation during the fourth quarter of 1951 and during the first, second, and third quarters of 1952 and to pay such labor, and he knowingly and willfully failed to pay, collect, or truthfully account for and pay over the withholding and employment taxes that had been or should have been withheld from such labor payments and which should have been paid over to the United States. (R. 26-27.)

The taxpayer was at all times aware of the financial condition of the corporation and the availability and disposition of its funds. The money withheld was used and diverted to pay other expenses of the corporation and of the taxpayer individually. (R. 27.)

The affiant then denied knowledge of the self-serving allegations in paragraph 6 of the tax-

payer's affidavit, and specifically denied the allegations in paragraph 6c, d and e, and paragraphs 7 and 8. (R. 28.) (Paragraph 6c, d and e of the taxpayer's affidavit alleged that the taxpayer did not know that the taxes were not paid, and that the corporation's auditor had failed to follow instructions of the taxpayer that the taxes were to be paid. Paragraph 7 alleged that the taxes could have been paid only if the corporation had borrowed additional funds; and paragraph 8 alleged that the corporation was indebted to the taxpayer as shown by the taxpayer's drawing account on the books of the corporation and that the books were audited in the receivership and the drawing account found to be proper. (R. 21-24.))

The District Court ordered summary judgment entered in favor of the taxpayer, stating that it appeared from the affidavits of the taxpayer and the United States, from the stipulations of the parties and from the pleadings that there was no genuine issue as to any material fact and that the taxpayer was entitled to a judgment as a matter of law. (R. 28-29.) From this summary judgment the United States here appeals. (R. 30.)

STATEMENT OF POINTS TO BE URGED

1. The District Court erred in holding that there were no material issues of fact in controversy.

(a) The taxpayer's affidavit (R. 19) stated that he did not know that the corporation which he controlled had not paid over its withholding and unemployment taxes (R. 21, par. 6a-6e). This was specifically denied by the District Director of Internal

Revenue in his affidavit. (R. 26-27, 28, par. 3 (a)-(d), (g).)

(b) The willful nature of the taxpayer's failure to pay over such taxes was put into controversy. The District Director averred that the moneys withheld were used and diverted to pay other expenses of the corporation and of the taxpayer. (R. 27, par. 3 (e).) The taxpayer attempted to refute the allegation of willfulness by stating that the corporation was in poor financial condition (R. 21-24, par. 6f-o, 7) and that the taxes could have been paid only if the corporation had borrowed additional funds (R. 23-24, par. 7). The latter allegation was specifically denied by the District Director. (R. 26, 28, par. 3 (g).)

2. The District Court erred in granting the taxpayer's motion for summary judgment where there were present the above stated issues of fact since both the question of knowledge of the failure of the corporation to pay the taxes, and the diversion of withheld taxes to pay other expenses of the financially unstable corporation and the taxpayer are material to a determination of whether or not the taxpayer failed to pay over such taxes willfully.

3. If the District Court concluded from the admissions in the taxpayer's affidavit that he knew that the corporation which he had controlled had failed to pay over withheld taxes, and that the reason therefor was the poor financial condition of the corporation, then the taxpayer was liable for the penalty imposed for willful failure to pay over such taxes and the District Court erred in holding that the taxpayer was entitled to judgment as a matter of law.

4. If the District Court concluded from the admissions in the taxpayer's affidavit that he knew that the corporation which he controlled had failed to pay over withheld taxes, and that the reason therefor was the poor financial condition of the corporation, then the taxpayer was liable for the penalty imposed for willful failure to pay over such taxes and the District Court erred as a matter of law in refusing to grant the cross-motion of the United States for summary judgment.

SUMMARY OF ARGUMENT

1. The District Court erred in granting the taxpayer's motion for a summary judgment when material issues of fact were in direct controversy. The Federal Rules of Civil Procedure, Rule 56 (c), provide that a summary judgment may be rendered only if there is no genuine issue as to any material fact. Here, the taxpayer in his affidavit in support of his motion for summary judgment stated that he had instructed his auditor to pay the taxes in question, that the auditor did not comply with his instructions, and that the taxpayer was unaware that the taxes were unpaid. This was specifically contradicted by the affidavit filed by the United States in which it was stated that the taxpayer had full knowledge of the tax affairs of the corporation and that the taxpayer had been personally contacted by the office of the District Director on numerous occasions with repeated demands for payment of the taxes in controversy. This factual disagreement involves an issue material to the disposition of the case. The assessment against the taxpayer was made under Section

2707 (a) of the Code which provides a one hundred percent penalty for "Any person who willfully fails to pay, collect, or truthfully account for and pay over the tax." The question of whether taxpayer willfully failed to pay over the taxes involves facts not resolved by the pleadings and affidavits.

The fact that the United States filed a cross motion for summary judgment in no way changes the basic rule that such a judgment may be entered only where there are no material issues of fact, and this Court has specifically so held. Factual disputes should be determined on trial before a jury or judge, and the District Court herein erred in granting the taxpayer's motion for summary judgment.

2. The second requirement of Rule 56 (c) of the Federal Rules of Civil Procedure is that the moving party be entitled to judgment as a matter of law. In this respect too the District Court erred. It is submitted that if the taxpayer knew that the corporation which he controlled had not paid its withheld taxes, and the failure to pay over the taxes was due to the poor financial condition of the corporation, such failure to pay was "willful" within the meaning of Section 2707 (a) of the Code. Thus, if we assume, as we must, that the District Court considered immaterial the fact questions raised, then in view of the later admissions of the taxpayer that he had complete knowledge of the financial condition of the corporation, and knew that it was unable to pay its taxes, then the undisputed and admitted facts clearly show that the taxpayer was liable for the penalty imposed

as a matter of law. Here the failure on the part of the taxpayer to pay was *willful*. The fact that the corporation was in precarious financial condition and that the taxpayer was making an effort to prevent his business from failing does not excuse him from his failure to pay over the taxes which he had collected from his employees. Where such taxes are knowingly and intentionally used to pay the operating expenses of a business or for some other purpose instead of being collected and paid over to the Government, the penalty in question may properly be assessed. The very purpose of the penalty imposed by Section 2707 (a) is to prevent the operation of a corporate business with funds which would have been unavailable to it without the withholding provisions of the Code. The word "willfully" appearing in the statute does not necessitate a finding of wicked design or malice in the criminal sense, but rather only requires that the person act knowingly and with discretion. And here the taxpayer by his own admissions was so acting. This case clearly presents an instance where the taxpayer was gambling that by the temporary use of the withheld funds he would be able to keep the corporation going until its financial position improved. His actions were conscious, intentional and deliberate. While some courts have defined willful as meaning "without reasonable cause," an apparently unduly liberal interpretation, even under such a test the taxpayer is liable for the penalties imposed by Section 2707 (a). The use of withheld taxes for purposes of keeping an insolvent corporation operating cannot be termed a reasonable cause for failing to pay over

such taxes. These funds did not belong to the corporation and its use of these amounts was not reasonable.

For the foregoing reasons the summary judgment of the District Court in favor of the taxpayer should be reversed and a verdict directed in favor of the United States.

ARGUMENT

I

The district court erred in granting the taxpayer's motion for a summary judgment when material issues of fact, the question of the taxpayer's knowledge of the corporation's failure to pay over the withheld taxes and the question of the willful nature of the taxpayer's failure to pay such taxes, were put into direct controversy and not resolved by the pleadings and affidavits on file

Rule 56 (c) of the Federal Rules of Civil Procedure, *supra*, provides that a summary judgment "shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that * * * there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The United States has consistently maintained throughout this action that there are present genuine issues of fact³ which are material to a determination of this matter on the law.

The taxpayer in his affidavit in support of his motion for a summary judgment stated that it was the business practice of the corporation to have the

³ The cross-motion for summary judgment filed by the United States specifically stated that "by this Cross Motion defendant does not concede that there are no disputed issues of material fact in this action to support any judgment for the plaintiffs." (R. 25.)

auditor make out and the bookkeeper sign checks for payment of corporate obligations; that the taxpayer instructed the auditor to make checks covering the withheld taxes for the fourth quarter of 1951 and the first two quarters of 1952; that the auditor did not so comply; and that the taxpayer did not realize that the taxes were unpaid. (R. 20-21, par. 6a-e.)

These averments were directly contradicted by the affidavit filed by the United States in opposition to the taxpayer's motion for a summary judgment and in support of the United States' cross motion for summary judgment. Homer H. Forrester, the Chief of the Delinquent Accounts and Returns Branch, stated that the taxpayer had "full knowledge of the financial and tax affairs of the Gardner Supply Company, Inc." (R. 26, par. 3 (a).) He also averred that the taxpayer was personally contacted by the office of the District Director of Internal Revenue on numerous occasions with repeated demands for payment of the taxes in controversy and that the taxpayer admitted knowledge of the corporation's liabilities. (R. 26-27, par. 3 (b).)

While it is conceded that if an issue is not material to a legal determination a summary judgment may properly be granted, such is patently not the case in the present action where the factual disagreement involves an issue material to the disposition of the case. The assessment against the taxpayer was made under Section 2707 (a) of the Internal Revenue Code of 1939,⁴ *supra*. This section provides for a hundred

⁴ References to "Code" or "Internal Revenue Code" refer to the Internal Revenue Code of 1939 unless otherwise noted.

percent penalty for "Any person who *willfully* fails to pay, collect, or truthfully account for and pay over the tax imposed by section 2700 (a), or *willfully* attempts in any manner to evade or defeat any such tax or the payment thereof."⁵ [Italics supplied.] Section 2707 (d), *supra*, provides that—

The term "person" as used in this section includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

Thus, the question around which this controversy presently turns is whether or not the taxpayer willfully failed to pay over the employment and withholding taxes. The questions of whether the taxpayer had instructed his employee to pay such taxes and whether he actually did not know and had no reason to know that his instructions had not been carried out, ^{are} ~~is~~ of relevance in determining if he *willfully* failed to pay over the taxes.⁶ *Levy v. United States*, 140 F. Supp. 834 (W. D. La.). The willful nature of the taxpayer's failure to pay is the main point of con-

⁵ While Section 2707 (a) by its terms refers specifically to the tax on firearms, the penalty provisions contained therein are made applicable to employment taxes by Section 1430 of the Code, *supra*, and to withholding taxes by Section 1627 of the Code, *supra*.

⁶ The taxpayer's statements admittedly appear refuted to a great extent by the later admissions in his affidavit wherein he sets forth in great detail the precarious financial condition of his corporation and the fact that funds were not available for the payment of taxes. It is based upon these admissions that the United States argues alternatively that the District Court erred in failing to enter a summary judgment in favor of the United States.

tention in this case, and the question of whether the taxpayer knew that his instructions to pay the taxes had not been carried out, or indeed whether he ever gave the alleged instructions to pay such taxes, is a material, genuine issue of fact about which the parties to this action are in complete disagreement.

Other facts potentially bearing on the question of willfulness of the taxpayer are likewise material and in direct issue. The taxpayer alleged in his affidavit that the taxes in question could have been paid only if the corporation had borrowed additional funds and that the assets of the corporation and of the taxpayer were completely pledged on previous loans. (R. 23-24, par 7.) This is, of course, contrary to the taxpayer's earlier allegations that he instructed his employee to pay the taxes. Additionally, it was specifically denied by the affidavit on behalf of the United States (R. 28, par. 3 (g)), in which it was also stated that although the taxpayer knew that the corporation was not making payment of such taxes, the taxpayer, in control of the affairs of the corporation (R. 26, par. 3 (a)), continued to employ labor on behalf of the corporation during the period in question (R. 27, par. 3 (c)). Also the United States averred that the money withheld was used and diverted to pay other expenses of the corporation and of the taxpayer. (R. 27, par. 3 (e).) The inferences as to willfulness which might reasonably be drawn from the various allegations set forth above must be determined by the finder of fact. Thus, where the evidence is such that conflicting inferences might be drawn therefrom, summary judgment is not properly granted. *Sarkes*

Tarzian, Inc. v. United States (C. A. 7th), decided February 7, 1957.

The fact that the United States filed a cross motion for summary judgment⁷ in no way changes the basic rule that such a judgment may be entered only where there are no material issues of fact. As this Court stated in *Hycon Manufacturing Co. v. H. Koch & Sons*, 219 F. 2d 353, 355:

The trial court exceeded the permissible limits of determination of disputed questions without trial. A motion for summary judgment cannot be granted simply because both sides move for it. An indispensable prerequisite to such a judgment is the absence of a material question of fact. But it is obvious that there were postulates of fact involved in the diametrically opposite positions of the respective litigants. Both contentions of fact could not be true.

And see *F. A. R. Liquidating Corp. v. Brownell*, 209 F. 2d 375 (C. A. 3d), and the cases cited therein. So, too, in the case at bar. Either the taxpayer's statement that he did not know the taxes were unpaid or his statement that no funds were available with which to pay the taxes, or the affidavit on behalf of the United States that the taxpayer had admitted knowledge of the liability was untrue. Such material facts in controversy may only be determined on trial before a jury or judge.⁸ *Griffeth v. Utah Power & Light Co.*, 226 F. 2d 661 (C. A. 9th); *Homan Mfg. Co. v. H. A. Long* (C. A. 7, decided Feb. 4, 1957).

⁷ See fn. 3, *supra*.

⁸ Here the taxpayer has demanded a trial by jury. (R. 11.)

Accordingly, it is submitted that the District Court erred in granting the motion of the taxpayer for summary judgment.

II

Where the taxpayer knew that the corporation which he controlled had not paid its withholding and employment taxes, and the taxpayer failed to pay over such taxes because of the poor financial condition of the corporation, such failure to pay was "willful" within the meaning of Section 2707 (a) of the Code

The second requirement of Rule 56 (c) of the Federal Rules of Civil Procedure, is that the moving party be entitled to a judgment as a matter of law. In this respect, too, it is submitted, the District Court erred. If, in making its decision, the District Court determined that the questions of fact raised were immaterial, in view of taxpayer's admissions that in any event no funds were available for payment of taxes (R. 22-23, pars. 6g-6n), though wages were continued to be paid,⁹ then the admitted and undisputed facts clearly show that the taxpayer was liable as a matter of law for the hundred percent penalty

⁹ On the admitted facts in the taxpayer's pleadings and affidavit, as well as the undisputed averments in the United States' affidavit, the District Judge might well have discounted the statement of the taxpayer that he did not know that the taxes were unpaid. The record is replete with indicia that the taxpayer was in complete control of the corporation and well aware of all its financial transactions. The taxpayer stated that he personally guaranteed to meet the current payroll of the corporation (R. 22, par. 6g); and that he loaned money to the corporation to pay its payroll during the applicable period (R. 22, par. 6h). The admission of the taxpayer that when the corporation went into receivership he no longer had any control over the affairs of the corporation (R. 23, par. 6m) clearly implies that he had such control prior to receivership.

imposed by Section 2707 (a) of the Code. The basis upon which this penalty is imposed is a *willful* failure to pay, collect, or truthfully account for and pay over such taxes. And here the failure on the part of the taxpayer was *willful*. The taxpayer has set forth in great detail in his affidavit the precarious financial condition of the corporation which he controlled, and details various loans which he either made to the corporation out of his personal assets,¹⁰ or loans by others to the corporation which he personally guaranteed. (R. 22, 24, par. 6g-h, 8.) However, the fact that the taxpayer was making an effort to prevent his business from failing does not excuse him from his failure to pay over the withholding and employment taxes which he had collected from his employees. Where withholding and employment taxes are knowingly and intentionally used to pay the operating expenses of a business or for some other purpose instead of being collected and paid over to the Government, the penalty in question may be properly assessed. The word *willful* does not necessitate a finding of wicked design or malice in the criminal sense, but rather only requires that the person act knowingly and with discretion. The Supreme Court of Texas, in *Paddock v. Siemoneit*, 147 Tex. 571, 218 S. W. 2d 428, has expressly so held under a factual situation remarkably similar to that at bar. In that case the United States intervened in an action brought

¹⁰ In this respect, paragraph 6f of the affidavit (R. 20, 21-22) is completely immaterial in that it obviously refers to sums which the taxpayer borrowed to pay corporate withholding and social security tax liabilities for periods prior to those presently under consideration.

by a trustee in bankruptcy to establish a trust in favor of the bankrupt corporation upon certain property. The United States, in intervention, requested a judgment under Section 2707 (a) against the individual defendant who was the disbursing officer of the bankrupt corporation. Because the corporation was in poor financial condition, the defendant officer thought it prudent not to pay withholding and employment taxes in order to conserve corporate funds for operations. The court stated (pp. 583-584):

Respondent admittedly knew that the taxes were due. There was no contention that the statute was inapplicable to the taxpayer, * * *. Nor does the proof show that the corporation could not have paid the taxes when they were due. The proof merely shows that it was inconvenient for the corporation to pay the taxes at that time, and that it was thought that the corporation would have a better chance to operate profitably if it postponed the payment of its tax obligation and used the funds for its own purposes instead of paying them over to the Government as the law requires. The choice was knowing, deliberate and intentional, and with full realization that the law was being violated. In our opinion this is the kind of case which Section 2707 (a) was intended to cover. The respondent cannot be excused or justified because he hoped or even reasonably expected that the corporation would at a later date be in a better financial condition so that the payments could be made with less embarrassment. The purpose of the statute, to insure the prompt payment of taxes when due, would obviously be defeated by such an interpretation.

The admitted facts in the case at bar lead to the inescapable conclusion that the sums withheld by the corporation which the taxpayer completely controlled were thrown in with other corporate assets and used to finance the operation of the business. This is not a situation of a taxpayer failing to make or retain sufficient cash on hand to pay its own income or sales tax liabilities, but rather is an instance of using cash withheld from employees and due to the United States for the pursuance of corporate purposes. The taxpayer was clearly gambling that by the temporary use of the withheld funds he would be able to keep the corporation going until its financial position improved. And from the facts it is clear that he willfully took this chance with funds which were not properly his to use. His actions were conscious, intentional and deliberate. The taxpayer's knowledge of the financial condition of the corporation as set forth in his affidavit makes more than unlikely the fact that he did not realize the taxes were unpaid. In fact, his detailed knowledge of the fact that the corporation had insufficient funds directly refutes his earlier contentions that he ordered and desired the taxes to be paid. Indeed, it would seem that the taxpayer, realizing the fund shortage with which the corporation was pressed, had an affirmative obligation to make certain that these withholding and employment taxes were paid. The very purpose of the penalty imposed by Section 2707 (a) of the Code is to prevent the operation of a corporate business with funds which would have been unavailable to it without the withholding provisions of the Code. That is

to say, to prevent businesses from operating by means of the withheld taxes of their employees, or it might be stated, to prevent businesses from operating at the Government's expense. That, it is submitted, is what the Gardner Supply Company, Inc., was doing in the case at bar. From the admissions of the taxpayer, it appears obvious that these withheld funds were in his hands at one time, as an officer of the corporation. The taxpayer admitted that during the applicable periods he personally guaranteed to pay the current payroll of the corporation (R. 22, par. 6g); and that he loaned money to the corporation to pay its payroll during the applicable periods (R. 22, par. 6h); that the corporation operated on borrowed capital during the periods (R. 22, par. 6i); and at the time the payments of taxes were due there was insufficient money in the bank to pay them (R. 22, 23, par. 6j-l). There is no allegation that the wages were not paid. From this one can only assume that what happened was that the corporation, under the taxpayer's guidance, paid the net wage to its employees, withholding the amount of withholding and employment taxes, and that the corporation did not set aside these funds for payment to the United States but commingled them with its other funds and used them for other expenses. This is the only conclusion one may gain from the taxpayer's admission that there was a payroll, but no fund to pay the taxes when the same were due.

The word "willful" is susceptible of many meanings, and its proper interpretation depends upon the context in which it is employed. *Spies v. United*

States, 317 U. S. 492. In discussing a statute which penalized carriers who “knowingly and willfully” failed to comply with requirements proscribing the confinement of cattle in railroad cars for more than a set period, the Supreme Court stated in *United States v. Illinois Cent. R. Co.*, 303 U. S. 239, 242-243:

Mere omission with knowledge of the facts is not enough. The penalty may not be recovered unless the carrier is also shown “willfully” to have failed. In statutes denouncing offenses involving turpitude, “willfully” is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U. S. 389, 394, shows that it often denotes that which is intentional, or knowing, or voluntary, as distinguished from accidental, and that it is employed to characterize “conduct marked by careless disregard whether or not one has the right so to act.”

The definition of the word “willful” in a civil statute as set forth by the Supreme Court in the *Illinois Cent.* case was followed in a case discussing Section 2707 (a) of the Code under a factual situation closely parallel to the one at bar. *In re Haynes*, 88 F. Supp. 379 (Kan.), involved a corporation which during the taxable year was insolvent and without sufficient funds to meet and pay its current obligations. Finding No. 7 was as follows (p. 383):

During a part of this time the Reconstruction Finance Corporation controlled and directed the disbursement of the funds of the corpora-

tion. There is no showing in the testimony that the corporation at any time during the year 1944 had sufficient funds to pay the "Federal Insurance Contribution Taxes" levied under section 1410 or the "Federal Unemployment Taxes" levied under section 1600. The evidence is indefinite as to whether the corporation had in its possession and under its control the Withholding Taxes but the presumption must necessarily be that since the corporation met its payroll that it received and had in its possession and under the control of its officers the Withholding Taxes, and the Court so finds.

In discussing the willfulness of the failure of the corporate officer to pay over the withheld taxes, the court held (p. 385):

It is in our judgment that as the word is used in this statute it does not mean wicked design but rather that the person acts knowingly and intentionally. It would seem therefore that if the officer of the corporation had in his hands or under his control the funds that had been set apart for the purpose of paying the tax and appropriated such funds to some other purpose that he acts "willfully."

Here, too, the corporation met its payroll, and here, too, the taxpayer chose to put these funds to a corporate use rather than paying them over to the United States. And it is submitted that the same result, imposition of the penalty, should obtain in the case at bar as in the *Haynes* case.

Some District Courts, in connection with Section 2707 (a), have defined willful as meaning "without

reasonable cause." *Kellems v. United States*, 97 F. Supp. 681 (Conn.); *Nugent v. United States*, 136 F. Supp. 875 (N. D. Ill.); *DeFranco v. United States* (S. D. Calif.), decided December 8, 1955 (1956 C. C. H., par. 9543). While the reasonableness test appears to result from an unduly liberal standard of interpretation, even under such a test the taxpayer herein is liable for the penalties imposed by the statute. The use of withheld taxes for purposes of keeping an insolvent corporation operating can scarcely be termed a reasonable cause for failing to pay over such taxes. These funds did not belong to the corporation and its use of these amounts was not reasonable. In the *Nugent* case, *supra*, the taxpayers did not pay over taxes withheld by the corporation for two alleged reasons: pending litigation by the State of Wisconsin concerning applicability of the employment taxes to corporations and the insolvency of the corporation prior to the termination of this litigation. The court held that these reasons did not offer a "reasonable cause" for the failure of the taxpayers to pay over the taxes. And in the *Kellems* case, the contention of the taxpayer that she believed the withholding act to be unconstitutional was held not to be a reasonable cause for failure to pay over the taxes. In the instant case, too, the taxpayer's action was willful and without reasonable cause. Thus, the District Court not only erred as a matter of law in granting summary judgment in favor of the taxpayer, but also erred in failing to grant the cross-motion of the United States for summary judgment.

CONCLUSION

It is submitted that for the foregoing reasons the summary judgment of the District Court in favor of the taxpayer was incorrect and should be reversed and summary judgment directed in favor of the United States.

Respectfully submitted.

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FEBRUARY 1957.

No. 15,291

IN THE

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

VS.

MERVIN L. GARDNER and MYRTLE G.
GARDNER, his wife,
Appellees.

On Appeal from the Judgment of the United States District Court
for the District of Nevada.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

INTRODUCTION.

Appellees will accept appellant's statement of the case with the exception that on pages 7 to 10 of its brief, in stating the material parts of the taxpayer's affidavit in support of his motion for summary judgment, appellant omitted reference to paragraph 6(i) of the affidavit which reads:

"That during the latter part of 1951 and up to September 16, 1952, said corporation was operating on borrowed capital, had assigned the proceeds of its jobs to its lenders as security for said loans, and all through said period of time was on the narrow edge of bankruptcy." (R. 22, para. i.)

Appellant lists quite a few points to be urged (Appellant's Brief pp. 12-14), but reduces these to two points of argument. Appellees will answer each point separately and state the points as follows:

STATEMENT OF POINTS TO BE URGED.

1. No material issues of fact were in controversy.
2. Appellee Gardner did not wilfully fail to collect and pay the withholding and F.I.C.A. taxes.

SUMMARY OF ARGUMENT.

Appellees' motion for summary judgment was properly granted.

No issues of fact existed. The opposing affidavit of Mr. Forrester was hearsay and was not based on personal knowledge so could not be considered by the court—but, even if considered, it raised no issue as to the ability of the corporation to pay the taxes when due. It is undisputed that at the time the tax payments were due the corporation had no funds to pay the taxes and was insolvent. At the time the last tax payment was due, the corporation was in receivership and appellees no longer had any control over corporate affairs.

I.

NO MATERIAL ISSUES OF FACT WERE IN CONTROVERSY.

Appellant's position is that the affidavit of Homer H. Forrester (R. 26-28) contradicted the taxpayer's affidavit.

It is appellees' firm belief that Mr. Forrester's affidavit presented no basis for denying appellees' motion for summary judgment.

Appellees will here discuss each paragraph of Mr. Forrester's affidavit as it related to appellees' motion for summary judgment. However, before so proceeding, it might be well to quote the rule from the Federal Rules of Civil Procedure which governs the form of affidavits to be used in supporting or opposing motions for summary judgment. The rule is as follows:

"Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits."

Rule 56(e), *Federal Rules of Civil Procedure*.

Paragraphs 1, 2 and 3 of Mr. Forrester's affidavit (R. 26) are rather general and apparently designed to demonstrate his competency to make the affidavit.

"1. That he is the Chief of the Delinquent Accounts and Returns Branch, and as such has custody of the pertinent files and records in the office of the District Director of Internal Revenue, Reno, Nevada.

2. That he had personally examined and is familiar with these records and has supervised the

investigation into the affairs of the Gardner Supply Company, Inc. and Mervin L. Gardner, their records and the records of third parties having business transactions with them.

3. That on the basis of his personal knowledge and on the records of the office of the District Director made in the regular course of its investigations into the liabilities herein, affiant states that:" (R. 26).

The allegations contained in the paragraphs, however, cast considerable doubt on such competency as each paragraph refers to "records" as well as personal knowledge. We do not know which part of the affidavit is based on records and which on personal knowledge. The objection thus arises that, if the affidavit is based on written records, certified copies of such records should have been attached to the affidavit as required by Rule 56(e) of the Federal Rules of Civil Procedure:

" . . . Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. . . . "

Rule 56(e), *Federal Rules of Civil Procedure*.

Furthermore, Rule 56(e) requires that the affiant set forth matters as to which he would be competent to testify. Mr. Forrester would not be competent to testify to the records of Gardner Supply Co., Inc., of the appellees or of the District Director of Internal Revenue, much less the records of third parties referred to in Paragraph 2 of the affidavit. The records

themselves are the only competent evidence of their contents—hence the requirement of Rule 56(e) that certified copies of all papers referred to in the affidavit shall be attached to the affidavit. It would thus seem that the entire affidavit is faulty because based, to some unknown extent, on written documents and not on personal knowledge.

Nevertheless, let us examine the remainder of the affidavit for we will find that, even if we consider the material set forth, no basis was made for denying the motion for summary judgment. The next paragraph reads:

“3.(a) Mervin L. Gardner was in complete control of all phases of the operations of the Gardner Supply Company, Inc. during the times covered by the assessments herein and had full knowledge of the financial and tax affairs of the Gardner Supply Company, Inc.” (R. 26.)

Paragraph 3(a) is an extremely general statement, not of facts but of an opinion, of a conclusion. Even if it be accepted as stating facts, it would not have warranted denial of the motion in view of the uncontradicted facts set forth in appellees' affidavit.

Paragraph 3(b) states:

“3.(b) That Mervin L. Gardner was personally contacted by the office of the District Director on numerous occasions during the period the liability herein arose with repeated demands for payment by the Gardner Supply Company, Inc. of its taxes and he admitted knowledge of the corporation's liabilities.” (R. 26-27.)

Who in the office made the demands? This is not a statement made on personal knowledge as required by Rule 56(e) of the Federal Rules of Civil Procedure. The person who made the demand should have made an affidavit to that effect.

Paragraphs 3(c) and 3(d) of Mr. Forrester's affidavit are along the same general line as Paragraph 3(a), that is, "that appellee Mervin Gardner knew the corporation had not paid the withholding taxes and continued to employ labor on behalf of the corporation without paying the withholding taxes that had been or should have been withheld from the labor payments." (R. 27-3(c).) The quoted portion indicates that Mr. Forrester does not know whether the taxes were actually withheld or not. This seems odd in view of the statement in Paragraph 3(e) of the affidavit that the money withheld was diverted to other uses.

"3.(e) The money withheld was used and diverted to pay other expenses of the Gardner Supply Company, Inc. and Mervin L. Gardner individually." (R. 27.)

If Mr. Forrester does not know whether the money was withheld or not, how can he know whether or not it was diverted to other uses? This clearly demonstrates that the affidavit is not based on solid facts, but is based on supposition. Furthermore, Mr. Forrester's statement that Gardner knew the corporation was not paying its taxes is apparently based on the prior statement that a demand was made upon Gardner for the taxes. But we have seen that such

statement was not made on personal knowledge. The conclusion that Gardner had such knowledge is also thus not made on personal knowledge.

Paragraph 3(f) is a statement of position and not of fact and cannot be considered as evidence, except as to the statement of assessments made.

“3.(f) The assessments herein were properly made and any monies collected thereon properly collected. These assessments were made on or about July 1, 1953, and the total amount of the assessments was \$38,781.63 plus statutory additions.” (R. 27-28.)

Paragraph 3(g) cannot be considered at all.

“3.(g) Without admitting any of the other allegations in the affidavit, he denies knowledge of the self-serving allegations in paragraph 6 of the plaintiffs’ Affidavit, and denies particularly the allegations in paragraphs 6c, d and e, and paragraphs 7 and 8 thereof.” (R. 28.)

The very use of such language indicates the complete lack of evidence to support the Government’s position. Mere denials have no place in an affidavit opposing a motion for summary judgment.

“Mere formal denials or general allegations which do not show facts in detail cannot defeat summary judgment. *McClellan v. Montana-Dakota Utilities Co.*, 109 F. Supp. 46, Aff’d. 204 F. 2d 166. . . . Where defendant’s motion for summary judgment in civil right proceeding was supported by proper affidavits and plaintiffs’ counter-affidavit was devoid of any factual matter, the motion would be granted. *Morgan v.*

Sylvester, 125 F. Supp. 380. . . . One cannot reserve his evidence when faced with motion for summary judgment by mere formal denials or general allegations which do not show the facts in detail or with precision. Appolonio v. Baxter, 217 F. 2d 267.”

10 *Cyclopedia of Federal Procedure, 1955 Cumulative Supplement* 29-30.

Since the affidavit of Mr. Forrester is not made on personal knowledge, does not show that Mr. Forrester is competent to testify to the matters stated in the affidavit, and does not have attached sworn or certified copies of the records referred to in the affidavit, all as required by Rule 56(e) of the Federal Rules of Civil Procedure, the affidavit is no affidavit at all and is not entitled to any consideration.

It is also interesting to note that Mr. Forrester's affidavit does not even refer to the insolvency of the corporation; or does the affidavit—or appellant's brief herein—attempt to explain why appellee Mervin Gardner was penalized, among other things, for failure to see that the corporation paid the third quarter 1952 taxes when it is undisputed that at the time such taxes were payable the corporation was in receivership and Gardner no longer had any control over corporate affairs? (R. 23, Para. M.)

II.

APPELLEE GARDNER DID NOT WILFULLY FAIL TO COLLECT AND PAY THE CORPORATE WITHHOLDING AND F.I.C.A. TAXES.

Before presenting their argument on this point, the appellees will first briefly review the decided cases which have involved the penalties in question.

Paddock v. Simoneit, 218 S.W.2d 428 (Supreme Court of Texas, 1949):

In this case, the U. S. Government sued the managing officer of a corporation for the civil penalty assessed for wilful failure to pay withholding tax. The court held the officer liable for the penalty with the following facts appearing:

a. Officer was the disbursing officer of the corporation.

b. Officer knew the taxes were due and knowingly and intentionally decided not to pay the taxes.

c. Court found no proof that the corporation could not have paid the taxes when due.

d. Officer was indebted to the corporation in the amount of \$30,510.63 for advances made to him by the corporation.

Comment: It will be noted that as to each of the above factual elements, the reverse of such facts exists in the present case. The corporation had no funds to pay the taxes when due and the corporation was indebted to appellees in the sum of \$6,814.30 (R. 24, Para. 8) at the time it went into receivership.

In Re Haynes, 88 Fed. Suppl. 379 (U. S. District Court, Kansas, 1948):

The government filed a claim against the bankrupt's estate for the one hundred percent (100%) penalty for failure, as President of the corporation, to pay withholding and F.I.C.A. taxes. The court held the penalty applicable and said:

“It is in our judgment that as the word ‘wilful’ is used in this statute, it does not mean wicked design but rather that the person acts knowingly and intentionally. It would seem therefore that if the officer of the corporation had in his hands or under his control the funds that had been set apart for the purpose of paying the tax and appropriated such funds to some other purpose that he acts ‘wilfully’.”

In Re Haynes, 88 Fed. Suppl. 379.

The following pertinent facts appeared in the case:

- a. No showing that the corporation did or did not have sufficient funds to pay the taxes.
- b. Court presumed that if corporation paid workers' wages that it had funds to pay withholding taxes, the evidence being indefinite on this point.

Comment: Court went on presumption that the corporation had funds to pay the taxes and used funds for some other purpose. In the present case, the affidavit of Gardner clearly shows that the corporation had no funds with which to pay withholding. The corporation was practicing deficit financing and could have paid withholding only if it had borrowed more

money. Can Gardner be guilty of “wilfully” failing to pay when the corporation would have had to borrow money to pay?

Kellems v. U. S., 97 Fed. Suppl. 681 (U. S. District Court, Conn., 1951):

This was the rather well-known case where Vivien Kellems refused to pay withholding, contending the law providing for such was unconstitutional. The court held her liable for the one hundred percent (100%) penalty, holding that she had no reasonable ground upon which to base her belief that the statute was unconstitutional. The court had occasion to say “that the word wilful in the penalty statute means ‘without reasonable cause’, that is to say ‘capricious’.”

Comment: It cannot be seriously contended here that appellees’ failure to see that the taxes were paid was “capricious.”

Wade v. U. S., 54-2 U.S.T.C. 47-145 (U. S. District Court, W. Va., 1954):

This opinion is not very helpful as it consists only of the formal findings of fact and conclusions of law. The facts of the case are not disclosed in the opinion, but the court held the officer of the corporation not liable for the 100% penalty and found him entitled to recover from the United States the penalty collected. The following note was appended to the opinion by C.C.H., the publishers of the volume:

“The record of the case discloses that the complainant was the president of the employing cor-

poration, but had been given one share of stock to qualify as such and had been made president at the instance of a large lien creditor to supervise the affairs of the company for the protection of the creditor and of all other creditors. The treasurer of the company (not involved in this case) was charged with the duty of preparing, and did prepare, the withholding returns—C.C.H.”

Comment: In the present case the auditor and the bookkeeper, not Gardner, were given the duty of preparing the tax reports and of making and signing the checks to pay the taxes due.

Levy v. United States, 140 Fed. Suppl. 834
(U. S. District Court, W. D. Louisiana, 1956):

This opinion also is in the form of findings of fact and conclusions of law.

The facts as found by the court were that taxpayer was the manager of the corporation and his duties included collection and payment of social security and withholding taxes. Because of the poor condition of the corporation, the taxpayer personally paid \$2,000.00 of corporate taxes in an effort to keep the business going. After this payment an apparent employee of the corporation was instructed to deposit all such taxes in a special fund and to pay such taxes promptly. The employee failed to do this and taxpayer did not discover such until a time in late 1952 or early 1953 when the corporation had no funds with which to pay the full amounts due. The taxes due were for the last quarter of 1952 and the first quarter of 1953. On March 11, 1953, a pre-existing mortgage

was foreclosed putting the corporation out of business and leaving it without funds to pay the taxes.

The court concluded:

“Here, since plaintiff did not know that the taxes in question were past due and unpaid, until shortly before the corporation failed completely, and at a time when it could not pay, he could not have ‘wilfully’ failed to collect, pay, or truthfully account for them within the meaning of the section involved. Mere negligence, in failing to ascertain facts, is not enough to render him liable for the penalty.”

Levy v. United States, 140 Fed. Suppl. 834.

Comment: The case is almost on all fours with the present case. In the cited case, as in the present case, the taxpayer loaned money to the corporation to pay earlier taxes. In the cited case, the business was stopped by a mortgage foreclosure; in the present case the business was stopped by being placed in receivership. In the cited case, as in the present case, the corporations were practicing deficit financing and did not have the funds with which to pay the taxes.

Nugent v. United States, 136 Fed. Suppl. 875
(U. S. District Court, N. D. Illinois, 1955).

In this case the taxpayer claimed that failure to pay social security taxes was not wilful because:

(1) At the time the taxes were due the State of Wisconsin was engaged in litigation concerning the applicability of the taxes to the corporation, and

(2) That the corporation became insolvent prior to the termination of the litigation.

As to the first point, the court noted that had the corporation prior to filing the Social Security Return paid the State of Wisconsin instead of the United States and the litigation determined that payment should have been to the United States, the law allowed the corporation to take a credit in the amount paid the state against the tax due the United States. The corporation did not do this nor did the taxpayer even claim that the Social Security Tax was not applicable to the corporation.

On the second point, there was no evidence to show that the corporation was insolvent at the time the tax was due (only at the time of the termination of the litigation) and no such contention was urged by the taxpayer.

Comment: In the present case the undisputed facts show that the corporation was insolvent when the taxes were due—indeed, when the last tax payment was due the corporation was in receivership.

Let us now examine the present case in the light of the above-cited cases.

The corporation was first on the verge of not paying withholding and F.I.C.A. taxes in the third quarter of 1951. Appellee Mervin Gardner personally prevented such by borrowing sufficient funds on his life insurance to pay the taxes (R. 21, Para. f). Had the corporation had the money to pay such taxes, Gardner certainly would not have borrowed on his life insurance. Since the corporation's financial condition became worse, not better, in the following quar-

ters, it must be clear that the corporation did not have funds to pay the taxes.

As to this, however, the appellant argues:

“However, the fact that the taxpayer was making an effort to prevent his business from failing does not excuse him from his failure to pay over the withholding and employment taxes which he had collected from his employees.” (Appellant’s Brief, page 23.)

The fault with this argument, which is the heart of appellant’s case, is that it assumes that money was actually withheld—that there was some fund—fleeting though its existence might have been, which the corporation could identify as money withheld from wages. Such an assumption is not supported by the facts—uncontradicted facts—which clearly show that the corporation was deeply in debt and operating at a loss. The money paid to employees was not corporate money but borrowed money. Are the corporate officers guilty of wilful failure to pay withholding and F.I.C.A. taxes by failing to borrow additional sums to pay the taxes?

However, from the appellant’s insistence that the money was collected, we may assume that the penalties were levied for failure to “pay” and not for failure to “collect.” Appellant can hardly argue that appellees failed to collect the taxes since it is admitted by all that the wages paid employees were reduced in the proper amount for withholding and F.I.C.A. taxes.

As is done in most businesses, the taxes due were no doubt set up on the corporate books as payable, a correct accounting made and report filed. (R. 21, Para. d.) The corporation did not pay the money when due simply because it did not have the funds. The taxes are payable on the last day of the month following the quarter in which the taxes accrued (1952 Income Tax Regulations, Sec. 405.601). It is uncontradicted that at the end of each such month that, not only was the corporation in debt on demand notes in excess of \$200,000.00 (R. 23, Para. o), but corporate checks written exceeded money in the bank by \$2,382.34 to \$7,673.27. (R. 22, Para. j, k, l.) Under such facts the corporation could not have paid the taxes. Appellees certainly cannot be found guilty of wilfully doing something which it was impossible to do.

That the question of solvency is important in this type of case is clearly shown by the consideration given the point by other cases.

In *Paddock v. Simoneit*, 218 S. W. 2d 428 (referred to at page 23 of appellant's brief with the remark that it involved "a factual situation remarkably similar to that at bar") the court found, in holding the penalty applicable, that there was no proof that the corporation could not have paid the taxes when due. The court said at page 583—"Nor does the proof show that the corporation could not have paid the taxes when they were due."

The court in the case of *In Re Haynes*, 88 Fed. Suppl. 379, referred to on page 27 of appellant's

brief, held the penalty applicable but presumed the corporation had the funds to pay the taxes because (page 383):

“The evidence is indefinite as to whether the corporation had in its possession and under its control the Withholding Taxes. . . .”

The evidence is *not* indefinite in the present case and no such presumption can be made.

In *Levy v. United States*, 140 Fed. Suppl. 834, the court found that the corporation was without funds to pay the taxes and held the penalty not applicable.

In *Nugent v. United States*, 136 Fed. Suppl. 875, the court found that there was no evidence to show that the corporation was insolvent at the time the tax was due and held the penalty applicable.

In *Kellems v. United States*, 97 Fed. Suppl. 681, the solvency of the corporation was apparent and the penalty applied, while in *Wade v. United States*, 54-2 U.S.T.C. 47-145, the penalty was held inapplicable on other grounds.

We thus find that all of the courts which had occasion to comment on solvency of the corporation held the penalty applicable because of the failure to prove insolvency—and in the one case (*Levy v. United States*, 140 Fed. Suppl. 834), where insolvency was proven, the court held the penalty not applicable. The existence of ability to pay certainly appears to be a *sine qua non* to wilful failure to pay.

The appellant's position apparently is that a man should quit doing business before he gets in debt.

Such might be a salutary rule—however odd in a country built on credit—but it does not meet with the economic facts of life. Appellant seeks to penalize appellees one hundred percent for being connected with a corporation which went broke while indebted to the government. It would be an odd law in this free enterprise country of ours which would penalize a man one hundred percent for trying to make a business a success—and failing.

CONCLUSION.

The judgment of the Lower Court is correct on two separate grounds—

1. Appellees did not have knowledge of the failure of the corporation to pay the taxes.

2. Even if we assume appellees had such knowledge, it is undisputed that the corporation did not have the funds to pay the taxes when due and was insolvent.

Dated, Reno, Nevada,

March 18, 1957.

Respectfully submitted,

ROYAL A. STEWART,

RICHARD W. HORTON,

Attorneys for Appellees.

No. 15292.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NORTH AMERICAN AVIATION, INC., a corporation,

Appellant,

vs.

WANDA LEE HUGHES and RANDALL L. HUGHES, a Minor,
by his Guardian *ad Litem*, Harry Sutton,

Appellees.

APPELLANT'S OPENING BRIEF.

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FILED

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No. 15292.

IN THE

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NORTH AMERICAN AVIATION, INC., a corporation,

Appellant,

vs.

WANDA LEE HUGHES and RANDALL L. HUGHES, a Minor,
by his Guardian *ad Litem*, Harry Sutton,

Appellees.

APPELLANT'S OPENING BRIEF.

This is an appeal from a judgment for \$125,000.00 in favor of appellees upon the verdict of a jury, in a wrongful death action for damages brought by the heirs of decedent, Fred L. Hughes. The decedent, a pilot in the United States Army Air Force, was killed when a jet aircraft owned by the United States Government and operated by Hughes crashed shortly after take-off. The appellant, North American Aviation, Inc., manufactured the jet aircraft in question.

Judgment was entered on June 4, 1956 [Tr. p. 93].

A motion for judgment notwithstanding the verdict, or for a new trial, was filed on May 25, 1956, and after argument the Court denied both motions on June 13, 1956 [p. 95].

Notice of Appeal was filed on July 2, 1956 [p. 95]. A stipulation fixing the bond on appeal was filed on July 2, 1956, and an order was made by the Court approving the bond on appeal [p. 96].

A Statement of Points on Appeal was filed on September 26, 1956 [p. 885].

Jurisdiction was vested in the District Court by reason of a diversity of citizenship between the appellant and appellees, the appellees at all times being residents of the State of Ohio [p. 102]; the appellant at all times being a corporation organized pursuant to the laws of Delaware, but maintaining its principal place of business in the County of Los Angeles [p. 4].

The Constitution of the United States expressly provides for the jurisdiction in the District Courts of suits between citizens of different states where the sum sought is in excess of \$3000.00. Here the prayer of the complaint was for \$250,000.00 [p. 5].

Williams v. Green Bay & W. R. Co., 66 S. Ct. 284
326 U. S. 549, 90 L. Ed. 311.

An appeal from the final judgment of the United States District Court to the United States Court of Appeals is authorized by the provisions of the Judicial Code, 28 U. S. C. A. 1291.

Statement of the Case.

By stipulation, it was agreed between the parties that an F-86F aircraft, manufactured by appellant, North American Aviation Company, Inc., piloted by the deceased, First Lieutenant Fred L. Hughes, *crashed* at the west end of the Los Angeles International Airport immediately after takeoff, at approximately 3:27 p.m., on

December 18, 1953. This aircraft had been delivered to the U. S. Air Force, after acceptance by them, and Lieutenant Hughes was delivering it from the North American factory located at the Los Angeles International Airport, to Nellis Air Force Base, Las Vegas, Nevada, when this accident occurred. The aircraft was completely demolished and the pilot instantly killed [p. 19].

The remaining facts are hereinafter set forth under appropriate heading for the sake of clarity.

A. The Locale of the Accident.

The accident took place at the International Airport, where appellant produced the aircraft known as the "Jet F86F" [p. 218]. Although there are numerous landing strips, the particular strip involved was some 8500 feet long [p. 564], paved, and running in an easterly and westerly direction. At the westerly end of this paved strip there was an area approximately 312 feet wide [p. 216] where the ground was unimproved. At the end of this 312-foot strip was a paved highway known as Lincoln Boulevard, running in a northerly and southerly direction. A wire fence bounded the easterly and westerly sides of Lincoln Boulevard. On the westerly side of Lincoln Boulevard there was more unimproved land.

B. The Weather on the Day of the Accident.

The evidence is uncontradicted that the weather at the time of the accident was poor. Visibility was obscured by reason of a heavy fog bank which was rolling in from west to east. At the time of the accident this moving fog bank had already passed over Lincoln Boulevard and was proceeding easterly past the westerly end of the runway in question. Flight visibility was described as "zero"

[pp. 180, 535]. It was uncontradicted that the weather was "instrument weather", that is, that the rules relating to flying the aircraft by visual methods could not be used, and instrument flying was necessary [pp. 172, 173, 513].

At the time the ship became airborne the weather was so bad that it could not be seen from the control tower [pp. 519, 523, 524, 640]. Witnesses as close as two or three hundred feet away were unable, by reason of the fog, to visualize with any degree of accuracy the action of the plane while airborne [p. 304].

The weather was so bad that no Army Air Force acceptance flights were performed on the day in question. Some 18 scheduled flights were cancelled [pp. 307, 319].

The pilot was given an instrument clearance because of the weather [p. 445].

C. The Pilot.

The decedent was a First Lieutenant in the United States Army Air Force. At the time of his death he was twenty-five years of age [p. 111]. He had acquired a total flying time of 627 hours and 5 minutes of which some 279 hours were spent as a student. His total flying time in the jet aircraft was comparatively slight. Furthermore, much of his jet plane experience was in *visual* flying rather than instrument flying. As of June 1953 he had only 137 hours of instrument flying [p. 153]. The Army Air Force issued to its pilots two types of cards: one, a green card, which is something like a rank and requires at least 500 actual instrument flying hours; the other is a white card which permits no element of discretion on the part of the pilot; it merely shows a basic instrument qualification [p. 545]. Decedent had never had a green card [p. 154] although he did possess

a white card which was *not current*.¹ The white card must be renewed from time to time. In other words, the pilot, in order to maintain his white card, must fly 10 instrument hours in a month [p. 152]. If one does not have a current white card he is violating regulations to take-off with instruments [p. 546].

At the time of the decedent's death he did not have a current white card or instrument certificate because he had not flown the required number of instrument hours necessary to keep it current. Between September and the date of his death, in December, he had made two flights, with a total flying time of only 1 hour 50 minutes. From September 28, 1953, until the date of his death, he had flown *no instrument time whatsoever* [p. 156]. For *physical* reasons not disclosed by the deceased pilots log, he was suspended from flying during a part of April of 1953, only seven months before the fatal accident [p. 138]. In order to keep a white card current, the evidence disclosed a requirement that the pilot have at least 10 hours a month of instrument flying [p. 152].

D. The Aircraft.

The aircraft was a jet plane manufactured by the appellant solely for the United States Army Air Force. It contained approximately one million parts [p. 749]. It had been used by the Air Force for many years previously and had undergone numerous revisions in design through the four years of its manufacture. Approximately 5350 drawings were involved in the fabrication and construc-

¹Pilot Annis had over 10,000 hours, with 1500 hours in F-86's alone [Tr. p. 448]; Pilot Smith had 7500 hours, with 800 hours in F-86 aircraft [p. 504]; Pilot Kinkella had 5000 hours, with 800-900 in F-86's [p. 534].

tion of the aircraft [p. 749]. The plane is small, being approximately 37.1 feet in length, with a wing span of 36 feet. Photograph Appendix A [Deft. Ex. P]. The plane was capable of exceeding the speed of sound, 735 miles per hour [p. 318]. Photographs of the plane were introduced in evidence and marked Defendant's Exhibit P. The plane weighed approximately 14,000 pounds [p. 469]. It was equipped with two 200-gallon tanks that are suspended on the under surface of the wings about 20 feet apart [p. 322]. It is propelled by an engine manufactured by the General Electric Corporation. The General Electric Corporation had its own engine shop [p. 649, *et seq.*] check the engines. The engine is started with an electrical switch, air is sucked in through the front of the plane, compressed and drawn into a turbine; and fuel is then injected and a powerful flame created which produces a terrific thrust [pp. 326-328]. No useful purpose would be served by describing in great detail the mechanics of the operation [pp. 465-466].

The plane was fully equipped with all instruments necessary to enable it to be flown when weather conditions were bad. A jet aircraft requires no warm-up as do other planes *when the flight is conducted under visual rules*. Where, however, the flight is to be on instruments, it is necessary that the motor be warmed up for at least *five minutes* for the purpose of stabilizing certain of the instruments necessarily used for this type of flying. Thousands of these planes had been delivered [p. 479]. There was no evidence indicating that any of them had ever had any difficulty of any kind. Annis, the test pilot had flown 3000-4000 flights with this aircraft and had never had a power failure or "flame out" [p. 479].

E. Inspection Made of the Aircraft Prior to Delivery and Acceptance by the Army.

Throughout the course of the manufacture of the plane it is minutely checked and inspected in all of its various systems.¹ After the plane is completed it is again checked [pp. 334-338]. During the course of this checking it is customary to find that there are certain minor problems that have developed and accordingly, records are prepared giving the information on these problems, checks are made, and the problem is corrected [p. 335]. A certificate of completion [p. 375] is filled out upon completion and the plane is then test flown by one of the appellant's employees. The day before this accident the plane was flown for 45 minutes by one of appellant's test pilots [p. 312], who had preliminarily completely checked the plane [pp. 452-453].

On the first flight it was discovered that there were three minor "squawks". The gun site was not properly working [p. 312], there was a left roll [p. 312] when the plane was operated at high speeds and in a dive [p. 318], *i.e.*, in excess of 500 miles per hour, and the ship yawed to the left slightly with a speed increase at high speeds [p. 458]. These planes had a tendency to develop a slight roll due to the swept wing; the degree of acceptable roll was established by the Air Force [p. 316]. It was a *normal* and *typical* condition on a first flight [p. 316]. None of these squawks or complaints had anything to do with the take-off [p. 317] or operation at low speeds. Take-off speed was only 110 knots an hour [p. 318]. All

¹"About 225 inspectors take the plane from the time it starts in final assembly until time of delivery. . . . We progressively inspect each part that goes in the airplane, the components, and check out all of the systems to see that they function properly." [p. 333].

three of the squawks which appeared at the time of the first 40-minute flight were inspected and checked off or corrected [p. 458]. Thereafter a second 50-minute [p. 317] flight was performed which was both a test flight and an acceptance flight for the Army Air Force [p. 313]. Although the pilot who flew the Army Air Force acceptance flight was an employee of the appellant, this method of operation had long been in existence between North American and the Government [pp. 313, 314, 505]. After checking the previous squawks, the acceptance pilot observed that there was a moderate right roll, *i.e.*, that the matter of the roll at high speed had been slightly over-corrected [p. 509]. He then referred it back to the original squawk, with a suggestion that the flaps be re-rigged with a half turn back to the original position [p. 331]. This was done by a mechanic and appropriately inspected and approved.

Neither of the pilots had any difficulty at the time of take-off. The test pilot considered the plane clean and had no difficulty with it other than those mentioned, which were corrected [p. 484]. The roll referred to did not develop until he had reached a speed of 675 miles per hour. He flew as high as 45,000 feet [p. 510].

The motor was manufactured by General Electric Corporation, checked by them before installation, and then checked again by appellant before flight [pp. 338, 339]. It was placed in a sound abatement tunnel and the motor was "run out" [pp. 369-370].

In addition to the North American inspectors, the Army Air Force also has inspectors who independently make certain inspections of their own [pp. 366, 367]. The flight inspector checked the plane out after each flight [p. 378]. The first inspection took at least eight hours [p. 379].

The second inspection took four to five hours [p. 382]. Altogether, there were three inspections by the flight inspector [p. 387].

F. The Take-Off, Flight and Crash.

The flight was scheduled for an instrument take-off [p. 434] and decedent had filed a flight plan with the tower.

The decedent was observed to visually inspect the plane, climb into the cockpit, start the motor, and taxi the plane up to the east end of the runway. There is considerable smoke connected with a jet plane [p. 284]. The pilot stopped the plane there for a very short time, estimated by various witnesses to be less than a minute [p. 578]. He then took off as the fog bank was moving in and covering the west end of the runway¹ [pp 285-423, 574].

The take-off itself appeared to be normal. The Army Air Force acceptance pilot, Smith, "felt it rather strange he (decedent) should be taking off in adverse weather conditions" [p. 513]. Charles Kunzler testified to the same effect [p. 555]. Due to conditions of visibility those who observed the take-off were unable to follow the flight of the plane after it became airborne. The man in the tower could not see the end of the strip in question [p. 440]. One witness described the plane's height as 5 to 25 feet at the moment it disappeared into the fog bank [p. 575]. At a point approximately 125 feet west of the west end of the runway, the evidence is uncontradicted that the jet crashed to the ground [p.

¹One witness, John Rinaldi, testified that the engine was not run up to full throttle before the take-off [p. 413]. After the engine was started it took only a *minute* to get to the end of the runway, at which point the pilot hesitated only about *10 seconds* [pp. 424-5].

223]. A fire developed at that point immediately, and spread westerly across Lincoln Boulevard, burning the grass, dirt and then searing the asphalt surface of the highway [pp. 192, 196, 231]. The evidence was uncontradicted that the plane, after crashing, proceeded westerly, tore through the fence on the east side of Lincoln Boulevard, proceeded across the highway, crashed through the fence on the westerly side of the boulevard, and proceeded some 200 feet into a vacant field, where the major portions of the plane, fuselage, door assembly, engine and other larger parts were found. Smaller parts were found at various points from the point of the initial impact. Appellee's own evidence demonstrated that at the moment the plane struck the ground there was an explosion followed almost simultaneously by a fire. One witness testified that there was an explosion while the plane was still airborne, although he admitted that he was three or four hundred feet south of the accident, and that the visibility was *sero* at the end of the runway [p. 180].

Although this witness used the word "explosion," he does not claim to have seen any disintegrating explosion in midair, as that term is ordinarily used.¹ Furthermore, no one claims there was more than one explosion. The

¹Thus, the witness Patrick H. Rogers, testified:

"Q. Where was the plane when you first saw it, sir? A. It was air-borne at the time I seen it, it was air-borne about 25 to 40 feet, and just—well, it hadn't even got to the end of the runway when there was a loud explosion and a big burst of flame, 25 to 40 feet off the runway.

Q. What happened then? A. All I could hear was metal, and you couldn't see it on account of the fog.

physical fact relating to the gouges demonstrate without question that the plane was intact at the moment the fuselage and the two drop tanks hit the ground, causing the gas laden tanks to explode and start a searing fire from that point westward across the highway.

Another witness for appellees, Walter Spencer, saw the plane hit the ground and then blow up [p. 195].

Pilot Smith, although he could not see the plane after he entered the engine shop, heard the jet engine stop, then simultaneously heard an explosion and saw smoke coming up through the fog [pp. 524-525]. The engine appeared to be functioning normally as the plane went down the runway [p. 525].

Charles Kunzler saw the take-off, but the plane disappeared into a fog bank about 2000 feet off the edge of runway [p. 557], and he could not see it at all [p. 557] after that time.

William L. Pitts, an Air Force inspector, saw the take-off and observed the plane disappear into the fog bank [p. 640]. The wheels were retracted [p. 641]. This witness described the explosion as a very muffled sound [p. 645], sort of a "woomp" [p. 640]. The *explosion sound and the stopping of the engine were simultaneous* [p. 645]. Actually, it seemed more like an impact sound than an explosion [p. 646].

The Court: You couldn't see what?

The Witness: You couldnt see it on account of the fog."

The only reasonable conclusion in view of all the evidence, physical and otherwise, is that Rogers saw the plane, after it had crashed and exploded and then bounced back in the air, on fire before it tore through the fence and came to its final resting place.

H. Opinion Evidence of the Experts.

Appellant produced all of the available experts who participated in the investigation of this crash. It was the unanimous opinion of all of these men that the crash was not due to any failure of the aircraft or its component parts.

Major William Woolfolk, an Air Force man for 14 years [p. 581], participated in the investigation on behalf of the Army [pp. 583-4]. He found nothing wrong with the plane [p. 607]. He was of the opinion that there was no evidence of any material failure of the jet aircraft [p. 599]. He reached this opinion based upon his own observation and upon the work which he did in connection with other experts.

Frederick Preston, an expert from the General Electric Corporation [p. 663], concluded from various tests, which are too lengthy to describe in this statement of facts, that at the time of the crash the plane was operating at full military power [pp. 667, 672]. Preston testified: "our complete investigation of all systems and of all components on the engine indicated that it was capable of satisfactory operation prior to impact" [p. 672]. There was no evidence of any explosion within the motor [p. 674]. This expert found no evidence of a "flame out" [p. 695].

James Hoffman, an aircraft engineer who was also part of the team of experts, concluded from his investigation that there was no flame out [p. 718]. It was Hoffman's expert opinion that the fuel system was properly functioning at the time of impact [p. 714]; that the lubrication system was properly functioning at the time of impact [p. 716]; that the oil pump was found to be

intact and operable, even after the impact; that the oil and combustion cycle was found to be operable [p. 716]. In this expert's opinion there was "no malfunction of the engine or its fuel systems prior to impact" [p. 717].

Fred Prill, an aircraft project engineer on the F-86F series at North American, was at the scene shortly after the accident [p. 734]. He personally went over the ground and observed the gouge marks in the dirt between the westerly end of the runway and Lincoln Boulevard [p. 734]. These gouge marks conform to particular portions of the aircraft. The two outer marks were spaced approximately the same spacing as the two drop tanks on the airplane. The middle one indicated contact was made by the nose portion of the fuselage with the ground at that point [p. 734]. The gouge marks indicated that it had not been a flat belly landing, but rather was a rather unusual tail high altitude [p. 770]. If the landing had been a flat belly landing there would have been only the two marks made by the tanks and it would have been farther along the path before there would have been a third mark made by the fuselage [p. 770]. In his opinion, the crash indicated that the airplane hit and bounced, sailed across the road, breaking up as it went across the road, but not dragging across [p. 771].

He personally handled all the flight controls of the airplane and studied the aerodynamic surfaces. It was discovered that the trim actuator was improperly set [p. 739]. The stabilizer was trimmed seven-tenths of a degree up, which would cause the airplane to nose down [p. 739]. With the aircraft in the trim in which it was found, it would have required 23 lbs. of aft force at the stick grip by the pilot to maintain a straight and level flight after the gear and flaps had been retracted [p. 741]. Under

these circumstances, if the pilot even momentarily released his hand on this 23-lb. pull on the stick the plane would nose down rapidly [pp. 741-742].

He testified that from his complete examination of the plane there was no evidence of any malfunctioning of the aircraft at the time of the accident and that the only evidence of damage which he was able to find was that which was actually caused by the impact with the ground [p. 745]. It was his opinion that there was no evidence of any explosion prior to the impact with the ground [p. 747]. The evidence showed that the two drop tanks attached to the wings had split and ruptured and then exploded [p. 753]; the rending of the metal by the crash possibly creating a spark or the fire or shorting of one of the wires as a result of the impact may have produced a spark which caused the fuel to explode [p. 735].

He testified that the tail pipe clamp piece was intact [pp. 753, 758, 773].¹ While various airplane parts were found scattered around from the point of impact, this was due to the explosive force occurring at the time of impact [p. 756]. There was no evidence of an "in-the-air explosion" [p. 757]. If there had been such an explosion, there would have been a lot more parts scattered around the area [p. 759]. Accordingly, this expert thought there was no evidence of a rupture of any part of the plane

¹The tail pipe clamp piece became a straw man raised by appellees since apparently such a part was found approximately 200 feet from the point of impact and was included within the list of the various pieces of metal and airplane noted on the diagram prepared by the experts. There was no other evidence produced by appellees which would justify the assertion that this particular tail pipe clamp piece was from the aircraft in question. In fact, the evidence was all to the contrary. With hundred of similar planes flying over the strip, the particular piece might well have been from some other aircraft.

from any internal pressure—indicating no explosion in the air [p. 759]. The explosion that did take place was easily accounted for in view of the two drop tanks affixed to the wings. The gouge marks demonstrated the fact of impact. As the witness pointed out, the drop tanks hold fuel which was equivalent in explosive force to 70 or 75 sticks of TNT [p. 772].

In the witness's opinion the gouge marks demonstrated that there was no effort made to land the plane in a flat attitude, but rather that it was brought in at a sharp angle [p. 774]. As a matter of fact, the plane could easily be landed on the wing tanks when the wheels were retracted [p. 775].

Joseph Onesty, a hydraulic engineer, testified that he had examined the hydraulic system of the plane and, other than impact damage, found no evidence of anything wrong with the hydraulic system [p. 778]. In his opinion there was no indication that any part of the hydraulic system was not functioning properly up to the time of the impact with the ground [p. 778].

Alfred Lerbow, a power plant specialist for North American, testified that he likewise assisted in the investigation of the aircraft; that an examination of the plane almost immediately afterward showed that the tail pipe clamp was still intact on the plane [p. 800]. In his opinion, based upon his examination and inspection and upon his consultation with the other experts, there was no evidence of any malfunctioning of the plane or power plant prior to the time of impact [p. 802].

I. The Evidence Insofar as It Related to Possible Pilot Error.

The evidence was abundant that pilot error, negligent or *non-negligent*, could cause the jet plane to crash. Pilot error negates the concept that there can be any *control* in the manufacturer. The following factors appear in the evidence:

a. A throttle burst, pilot produced, could cause a flame out, *i. e.*, a stopping of the jet power plant [p. 630].

b. The pilot could accidentally or intentionally cut the fuel supply.

c. The pilot could accidentally or intentionally hit the very sensitive stick and move it in the wrong direction; for example, as the trial court himself pointed out, the pilot may have fainted in which event there would be no negligence on the part of the pilot, and yet clearly no liability on the part of the appellant [p. 349].

d. The pilot was a relatively inexperienced man in the flying of jet aircraft. *He had no current instrument white card*; he had never possessed a green card. He had not flown a jet airplane for almost two months before the accident. Even with a valid white card he would only be authorized to take off under visual conditions and the evidence was uncontradicted that the weather at the time of this accident was instrument weather. If he took off under visual conditions (which he might well have done since the fog bank had not yet reached the eastern end of the strip) and then tried to switch to instrument flying when he hit the fog bank, the evidence from skillful pilots was that this was a most hazardous procedure and could well affect the flight of the plane. See testimony of Kinkella [p. 516]. The evidence was uncontradicted that

the white card should be current. At least five hours instrument flying a month in last two or three months are mandatory, but not present here.

e. If the pilot took off with instruments in accordance with his flight plan, the uncontradicted evidence was that the plane was not warmed up sufficiently to stabilize the instruments needed for safe instrument flying. (No warm up is necessary with jet aircraft for mere visual flying)¹ [p. 455].

f. The evidence demonstrated that after the crash the trim actuator was *improperly* set. This could only have been the result of pilot error and comports with the actual physical facts at the point of impact, the angle of the plane, etc. [See testimony of Prill under point H (*supra*); also p. 739.]

g. Weather conditions were adverse [p. 513]; a fair inference might be that the pilot didn't warm up sufficiently because he hoped to become airborne *before* the rapidly approaching fog bank reached the westerly end of the runway.

h. Going into the fog bank the pilot had visual contact (even though the flight plan called for instrument flight) then had to switch to instruments—this transition at high speeds, may have caused the pilot to react unconsciously and affect the control stick [pp. 514, 518]. See Appendix B; see also Kinkella's testimony [pp. 542-544].

¹George Annis, test pilot, testified *uncontradicted*, that it takes a *five* minute warm up in order to properly stabilize the gyro horizon necessary for instrument flying [p. 455]. See also testimony of Joseph Kinkella [p. 541] and G. E. Beaudry, a security officer [p. 577] who had seen hundred of jet planes take off stated "this is the first time I ever saw one take so little time in the cockpit before taxing away" [p. 577].

i. Any blow on the throttle would affect the plane's operation; it can be moved backward or forward with very little effort [p. 526].

J. The Action of the Trial Court and Jury.

At the conclusion of the plaintiff's case, a motion was made for a dismissal [p. 197]. It was asserted at that time that appellees had failed to establish any negligence on the part of appellant in connection with either the design or manufacture or fabrication or the servicing of the plane in question. The trial court apparently denied this motion upon the theory that he did not think he would be justified in dismissing the plaintiff without a further examination of the authorities. He reserved the right to direct a verdict at the close of defendant's case and thereupon required the appellant to put on its case [p. 208].

Repeatedly throughout the trial, the court indicated that in his opinion the doctrine of *res ipsa loquitur* was not applicable; that the burden was upon the plaintiff to prove that the plane was negligently constructed [pp. 297-302; see lengthy colloquy between the court and counsel at pp. 345 to 362; pp. 498 to 503].

In view of the court's ruling, appellant was forced to undertake to produce all of the possible available evidence with reference to the manufacture, fabrication and testing of the airplane in question. As the trial court pointed out, the evidence indicated almost without contradiction that every phase of the ship with its complicated mechanism had been fully inspected. There is not one word of evidence which would indicate that the appellant had in any manner failed to comply with the ordinary standard of care in connection with the manufacture of airplanes in general or this aircraft in particular.

At the conclusion of the case, a motion for a directed verdict was made and denied [p. 829], the court denying the motion under Rule 50-b and reserving the right to rule on the motion in the event the jury rendered a verdict for the plaintiffs [p. 830].

The jury was instructed on the doctrine of manufacturer's liability, but no instruction was given on the doctrine of *res ipsa loquitur*. A verdict was rendered in favor of the appellees in the sum of \$125,000.00 [p. 855] and thereafter the motion for a judgment notwithstanding the verdict and/or new trial was presented and argued to the court. Throughout the course of the argument on these motions, which were both denied by the trial court, the court misconceived its duty in passing upon these respective motions and unfairly and incorrectly placed upon this appellant the burden of going forward with this appeal, despite the fact that the court could see no evidence of negligence. The pivotal language of the court is set forth in the footnote below.¹

Additional facts will be set forth at a later point in this brief in connection with the argument of the case.

¹I don't know on what theory the jury determined negligence in this case. I might be very frank in saying to counsel that if I had been trying this case without a jury I wouldn't have found for the plaintiff. In my opinion, I think that the plaintiff would have to prove more than an accident happened. *In my opinion I think that is all counsel proved*, that an accident happened. You would never have been able to say that because of this or that, say that a crash happened because of this or maybe because of something else. But it is not a problem as to what I would have done if I had been trying the case without a jury. The problem here is whether or not I have a right to substitute my opinion for the opinion of the jury. [Tr. p. 878.]

* * * I am satisfied in my own mind, regardless of what way I decide this case, that there will be an appeal. If I deny the motion, I am satisfied the defendant will appeal, and I would

Specifications of Assignments of Error.

The specifications of error are contained in the Statements of Points relied upon and are as follows:

1. The evidence was insufficient to support the verdict and judgment against the appellant;

2. There was no evidence of actionable negligence on the part of appellant;

3. There was no evidence that any negligent act or omission on the part of the appellant was a proximate cause of the alleged wrongful death of the decedent;

4. The trial court erred in denying the appellant's motions for judgment under Rule 50-B, Federal Rules of Civil Procedure [p. 884].

Summary of Argument.

The evidence fails to establish any actionable negligence on the part of appellant. Although appellees contend that the appellant was guilty of negligence in designing, manufacturing, fabricating and servicing the jet aircraft in question, they produced not one scintilla of evidence to support the proposition that there was any

suggest to the defendant that they do appeal. I am satisfied if I granted the motion, the plaintiff will appeal, and I would recommend to the plaintiff that he would appeal. So regardless of my decision, I think there is going to be an appeal in this case. I think I will place the burden of the appeal upon the defendant rather than upon the plaintiff. I don't feel justified in substituting my opinion for the opinion of the jury. Although I am very frank to say I don't see negligence, nevertheless, have I the right to say to litigants in a personal injury case, "You not only have to convince the jury that there is negligence, but you have to convince the court, which is the thirteenth juror, that there is negligence"? If I do, then what is the use of having a jury, because many, many times the court is not convinced and yet the jury is. [Tr. pp. 879-880.]

defect in connection with this particular aircraft or that there had ever been any defect or defects in any of the other aircraft of similar type manufactured by the appellant which would indicate negligence in design or manufacture.

Essentially the testimony, although conflicting in minor particulars, demonstrated that a plane which had been used by the Army for many years and manufactured by appellant, crashed while being operated by a relatively inexperienced jet pilot having no connection with appellant. While there are slight conflicts in the testimony of certain of the lay witnesses, the evidence demonstrated that the weather was bad, it was foggy, and was admittedly instrument weather. The plane was flown by a pilot who had no current instrument standing, although he presumably was attempting to fly with instruments. The cause of the catastrophe is shrouded in doubt and speculation.

It is only by a resort to the doctrine of *res ipsa loquitur* that the verdict and judgment can possibly be upheld, despite the fact that the trial court properly refused to apply this doctrine.

The case is of tremendous significance to the entire aircraft industry. If this verdict is to be upheld, where there is no evidence other than the fact that after a take-off, something happened to the plane, a virtual insurers liability will be placed upon every manufacturer of airplanes and helicopters. It is appellant's contention that the verdict of the jury is without support in the evidence and that the trial court erred in refusing to direct a verdict or in lieu thereof, refusing to grant appellant's motion for a judgment notwithstanding the verdict, or new trial.

ARGUMENT OF THE CASE.

I.

There Is No Evidence in the Record Sufficient to Sustain the Implied Finding of the Jury That the Appellant Was Guilty of Any Actionable Negligence.

A. Preliminary Observations.

Under this heading appellant will present Points 1 and 2 set forth in the statement of points on appeal [p. 884].

Appellant is of course thoroughly familiar with the fundamental rule that ordinarily questions of negligence and proximate cause are questions of fact for the jury. A well recognized exception, however, appears to this rule which is perhaps best stated by the California Supreme Court in the case of *Jacobson v. Northwestern Pacific R. R.*, 175 Cal. 468, at 473, where the court states:

“While ordinarily the question of negligence is one of fact to be determined by the jury, nevertheless, where the undisputed evidence is such that only one inference can be drawn therefrom, or it is of a character so conclusive that the court should in the exercise of its discretion set aside a verdict not in accord therewith, the question is one of law which warrants the court in directing a proper verdict. (*Davis v. California St. Ry. Co.*, 105 Cal. 131, 38 Pac. 647; *Delaware R. R. Co. v. Converse*, 139 U. S. 469, 35 L. Ed. 213, 11 S. Ct. 569.)”

See also:

Estate of Sharon, 179 Cal. 447;

Gleason v. Fire Protection Engineering Co., 127 Cal. App. 754 at 756;

McGraw v. Friend etc. Lumber Co., 120 Cal. 574.

It is well settled that a verdict cannot be sustained if the essential facts necessitate conjecture and speculation.

Reese v. Smith, 9 Cal. 2d 324, 328;

Wilbur v. Emergency Hospital Assn., 27 Cal. App. 751;

Puckhaber v. So. Pac. Co., 132 Cal. 363;

Chesapeake & Ohio Ry. Co. v. Thomas, 198 F. 2d 783 at 788.

The evidence in support of the verdict must be substantial. When there is a complete absence of probative facts to support the conclusion reached, the appellate court will reverse the judgment.

Lavender v. Kurn, 327 U. S. 645 at 653, 66 S. Ct. 744;

Moore v. Chesapeake & O. R. Co., 340 U. S. 573, 71 S. Ct. 428, 95 L. Ed. 547;

Looney v. Metropolitan R. Co., 200 U. S. 480, 26 S. Ct. 303, 50 L. Ed. 564;

Kansas City So. P. Co. v. Jones, 276 U. S. 303, 48 S. Ct. 308, 72 L. Ed. 583.

B. The Concept of Actionable Negligence.

Actionable negligence involves the concept of a duty, and a breach of that duty proximately causing injury or damage to the injured party.

Smith v. Buttner, 90 Cal. 95.

“These three elements—duty, breach and injury—when brought together constitute actionable negligence and the absence of any one prevents a recovery.”

19 Cal. Jur. 551.

See also:

Means v. So. Cal. Calif. Ry. Co., 144 Cal. 473.

The duty of a manufacturer toward an ultimate user has long been recognized in the law.

C. Manufacturer's Liability.

This cause proceeded to trial against appellant solely on the theory that as manufacturer it was guilty of negligence in connection with the design, manufacture, fabrication and servicing of the jet aircraft in question [p. 98]. Warranty of any type was expressly eliminated.

The doctrine of manufacturer's liability stems from such cases as *McPherson v. Buick Motor Company*, 217 N. Y. 383, 11 N. E. 1050; 65 C. J. S. 629.

The doctrine is well crystallized in California.

Sheward v. Virtue, 20 Cal. 2d 410;

Stults v. Benson Lumber Co., 6 Cal. 2d 688;

Judson Pacific-Murphy, Inc. v. The Stove Co.,
127 Cal. App. 2d 828.

The authors of California Jury Instructions, Civil (B. A. J. I.) have prepared an instruction which was given by the trial judge in this case, No. 218, set forth in Appendix C herein, which accurately reflects the duty of the manufacturer.

This duty is not that of an insurer and requires the manufacturer to give appropriate warning of any *known* danger which the user would not ordinarily discover, and to exercise ordinary care to the end that the product may be safely used.

There is not one scintilla of evidence in the record to indicate that appellant knew of any defect or danger of which it should have warned the decedent. There is not one scintilla of evidence to indicate that the appellant had any knowledge of any fact or circumstance which would have caused or which was in any manner responsible for the crash of the plane in question, whether it caught fire, whether it exploded, whether it crashed and caught fire and then exploded, or whatever the sequence of events may actually have been.

By stipulation it was conceded that the engine of the plane in question was built by General Electric and that all appellant did was to put it in the plane [p. 795]. Before and after installation it was appropriately inspected, operated, and passed all inspections.

When all of the many hundreds of pages of testimony are sifted through and analyzed, there is not one word of testimony from which it could reasonably be inferred that there was any failure of any part of the jet plane, due to any negligence on the part of the appellant, or otherwise.

Just as counsel was unable to point out to the trial court at any time during the course of the trial, any particular in which the appellant was guilty of any negligent act or omission which proximately caused the plane to crash, so it is impossible for respondent to point out to this court any evidence of any particular in which the plane was negligently designed, manufactured, fabricated or serviced, so as to proximately cause it to become airborne and crash.

While there have been cases involving manufacturer's liability as applied to aircraft, they are all cases where

there was *actual* proof of negligence in design in connection with a specific portion of the plane which caused the plane to crash. See for example:

Northwest Air Lines, Inc. v. Glenn L. Martin Co.,
224 F. 2d 120. (Failure of wing joints.)

The evidence demonstrated that the manufacturer knew that an alloy was used in the wing joints which was vulnerable to fatigue; further, that defendant did not run proper tests; that it failed to make changes even after having knowledge of the same failure in other planes of the same design manufactured by them.

D. The Doctrine of Res Ipsa Loquitur Is Inapplicable.

Appellees, throughout the trial argued the applicability of the doctrine of *res ipsa loquitur*. They were unable to point out to the Court any evidence of negligence in the manufacture, design, fabrication and servicing of the jet aircraft. The trial court refused, and properly so, to instruct on *res ipsa loquitur*.

It is well settled that the doctrine of *res ipsa loquitur* and the presumption of due care lie in the field of substantive law rather than in the realm of procedure. Therefore, the application of the doctrine is determined by reference to the law of the State of California.

Woodworkers Tool Works v. Byrne, 191 F. 2d 667
(per Yankwich);

Lachman v. P. A. Greyhound Lines, 160 F. 2d
496;

Smith v. P. A. Central Airlines Corp., 76 Fed.
Supp. 941 at 942.

The basic requirements for the application of the doctrine of *res ipsa loquitur* have been set down by the Supreme Court of the State of California.

1. The accident must be of a kind which ordinarily does not occur in the absence of someone's negligence;
2. It must be caused by an agency or instrumentality within the exclusive control of the defendant;
3. It must not have been due to any voluntary act or contribution on the part of the plaintiff.

Ybarra v. Spangard, 25 Cal. 2d 486;

Seneris v. Haas, 45 Cal. 2d 811;

Zentz v. Coca-Cola Bottling Co., 39 Cal. 2d 436;

Donner v. Atkinson, 47 A. C. 333 (1956).

None of the foregoing elements are present in the case at bar.

1. THE REQUIREMENT THAT THE ACCIDENT MUST BE OF A KIND WHICH DOES NOT OCCUR IN THE ABSENCE OF SOMEONE'S NEGLIGENCE.

This requirement has not been satisfied in this case. The Supreme Court of California has repeatedly set forth the rule that the doctrine of *res ipsa loquitur* is based upon a balance of probabilities.

Zentz v. Coca-Cola Bottling Co., *supra*;

La Porte v. Houston, 33 Cal. 2d 167.

In the latter case the Court refused to apply the doctrine. In this interesting case the plaintiff was injured when he drove his automobile to a garage for a carburetor adjustment. The gear level on the automatic transmission

was in neutral, according to plaintiff. Plaintiff got out of his car and was watching a mechanic employed by the defendant work on the carburetor. After the mechanic had accelerated the motor several times, the car suddenly lurched forward and struck the plaintiff. The Honorable Stanley N. Barnes refused to apply the doctrine of *res ipsa loquitur* and this conclusion was affirmed by the Supreme Court, since it could not be said in the light of common experience that the accident was more likely than not due to the negligence of the defendants. There was no balance of probability in favor of negligence on the part of the defendant. As the Court points out, at page 170, that while the mechanic was making an adjustment on the running motor of the car,

“It was at least equally probable that the accident was caused by some fault in the mechanism of the car, for which defendants were not liable, as that it resulted from any negligent act or omission of the mechanic. Accordingly, it cannot be said that it is more likely than not that the accident was caused by the negligence of the defendants, and hence the case was not a proper one for the application of the doctrine of *res ipsa loquitur*.”

In *Morrison v. Le Tourneau Co. of Georgia*, 138 F. 2d 339, the Court in an airplane accident involving the crash-death of a pilot and his passenger, refused the application of the doctrine of *res ipsa loquitur*. See particularly page 341.

See, also:

Spencer v. Beatty Saffway Scaffold Co., 141 Cal. App. 2d 875.

Of particular significance in this case is a case decided in the United States Circuit Court involving a jet aircraft. In the case of *Williams v. United States*, 218 F. 2d 473 (1955), a jet bomber caught fire and *exploded* in mid-air with no survivors. Plaintiffs were damaged by the falling of flaming fuel from the exploding airplane. They relied upon the doctrine of *res ipsa loquitur*. The Circuit Court rejected the application of the doctrine, saying at page 218 F. 2d 476:

“In the final analysis, each case seeking to invoke this doctrine, must stand or fall upon its own facts. *Res ipsa loquitur* is a rule based upon human experience, and its application to a particular situation must necessarily vary with human experience. A situation to which the doctrine was not applicable a half century ago because of insufficient experience or lack of technical knowledge, might today fall within the scope of the rule, depending upon what experience has shown. The concept presupposes that the defendant, who had exclusive control of the thing causing the injury, has superior knowledge or means of information to that possessed by the plaintiff as to the cause of the accident. *It is not enough that the plaintiff show that the thing which injured him was in the exclusive control of the defendant, he must also show that the accident would not have occurred in the ordinary course of events if the defendant had exercised due care.* Oftentimes experience in a particular situation is so uniform and well established that it is not necessary to prove this by extraneous evidence. However, such is not the case here. *We have no knowledge, judicial or otherwise, of what would cause a jet airplane to explode in midair while in flight.* In the absence, as here, of evidence showing that such an accident would not occur except for negligence,

there is no basis for a recovery. The trial court should have granted the Government's motion for judgment on this ground." (*Italics added.*)

The principle of this case is in full accord with many California cases.

For a particularly good discussion see the language of the Court in *Cohn v. United Air Lines Trans. Co.*, 17 Fed. Supp. 865 at 867 (Appx. D).

Many of the cases that have applied the concept of *res ipsa loquitur* to airplane accidents are cases dealing with common carriers, in which case the courts have held that the rule of *res ipsa loquitur* is ordinarily applicable.

See:

Smith v. O'Donnell, 215 Cal. 714.

2. IT MUST BE CAUSED BY AN AGENCY OR INSTRUMENTALITY WITHIN THE EXCLUSIVE CONTROL OF THE DEFENDANT.

This requirement has long been one of the basic elements of the application of this doctrine. It is the fact of control by the defendant which presumably gives the defendant more information with reference to the cause or possible cause of the accident than the plaintiff and justifies the imposition of a burden upon him of explanation.

See:

Michener v. Hutton, 203 Cal. 604;

Olson v. Whithorne, 203 Cal. 206;

La Porte v. Houston, 33 Cal. 2d 167.

Of particular significance in the case at bar is the leading California case of *Parker v. Granger*, 4 Cal. 2d 668. An action for damages for wrongful death was brought

by the heirs of certain passengers in two airplanes furnished by the defendants in connection with the taking of a motion picture. The collision occurred in mid-air, the pilots and all other persons killed and the action followed. The evidence demonstrated that there were *dual* controls on both of the airplanes. The directors sat next to the pilots at the dual controls. Although neither director was a licensed pilot, and although there would of course be a presumption that the deceased directors *had obeyed the law, i. e.*, not illegally flown the plane without a license, the Supreme Court nevertheless stated, at page 676, as follows:

“From the foregoing evidence the jury almost inevitably must have found that at the moment of the accident and immediately preceding that time, these planes were not in the exclusive control of respondent. In that event the doctrine of *res ipsa loquitur* could not be invoked against respondents. In effect, the jury was so instructed and was correctly so instructed.”

It would indeed be a strange rule which would hold a manufacturer liable for the crash of a plane which was in the sole physical control of the decedent, where the decedent by any one of innumerable conceivable acts could have brought about the crash of the plane. It is the *fact of control*, along with the other requirements of the doctrine, that principally furnishes a legal justification for imposing upon the defendant the obligation to come forward with an explanation. To impose the obligation of explanation upon a defendant out of control of the instrumentality is to impose upon him an impossible burden—the burden of an insurer.

3. IT MUST NOT HAVE BEEN DUE TO ANY VOLUNTARY ACTION OR CONTRIBUTION ON THE PART OF PLAINTIFF'S DECEDENT.

Obviously, one of the basic requirements for the application of the doctrine is that the plaintiff himself, or the plaintiffs' decedent in this case, must not have done anything in any manner nor responsible for the bringing about of the crash. The burden is thus cast upon the plaintiff to establish preliminarily that there was no fault or contribution on the part of the decedent.

One of the most interesting and important cases recently decided by the California Court is that of *Spencer v. Beatty Safway Scaffold Co.*, 141 Cal. App. 2d 875. In that case the action was against the manufacturer of a folding bleacher. While the plaintiff attempted to stand upon the retracting device and operate a winch device attached to the wall of a high school gymnasium the bleacher lid remained upraised, which should have lowered, as the bleacher was retracted, hitting the plaintiff, who was severely injured and suffered from a *retrograde amnesia*.

The Court refused to apply the doctrine of *res ipsa loquitur* since it did not appear that the injury was not caused by a voluntary act of the appellant. See particularly, page 882, *Cf.*, *Ybarra v. Spangard*, 25 Cal. 2d 486; *Zentz v. Coca-Cola Bottling Co.*, 39 Cal. 2d 436.

The Supreme Court of California in the recent case of *Leonard v. Watsonville Community Hospital*, 47 A. C. 516 (Dec., 1956), has laid the entire matter to rest. Any possible negligence which might be inferrable by a resort to the doctrine has been dispelled as a *matter of law* by the *clear and uncontradicted* evidence of appellant that there

was *no defect* in this plane. See particularly the Opinion of the Supreme Court at page 525 where the Court holds that even *on a nonsuit*, the evidence elicited by the plaintiff from a defendant under Code of Civil Procedure, Section 2055, may, unless controverted, dispel the inference as a matter of law.

E. The So-called Presumption of Due Care Is of No Benefit to Appellees Insofar as It Relates to the Application of the Doctrine of Res Ipsa Loquitur.

Appellees asserted throughout the trial the application of the doctrine of *res ipsa loquitur*. It was argued that since Lieut. Hughes met his death in a crash there was a presumption that he exercised due care for his own concern and obeyed the law (Code Civ. Proc., Sec. 1961), and that this presumption (which was properly applicable) would meet the requirement of the *res ipsa loquitur* rule that the injury must not have been due to any voluntary action of contribution on the part of the actor.

This argument is specious and was laid to rest by the Court in *Spencer v. Beatty Safway Scaffold Co.*, *supra*. In that case it was uncontradicted that a plaintiff was entitled to the benefit of a presumption of due care, just as was the decedent in the case at bar.

Ellison v. Lang Transportation Company, 12 Cal. 2d 355;

Ford v. Chesley Transportation Co., 101 Cal. App. 2d 548.

The Court held that the plaintiff was entitled to the benefit of the presumption of due care and that he was *thereby relieved of any charge of contributory negligence*. However, when it came to the question of whether or not

the doctrine of *res ipsa loquitur* be applied, the Court refused to apply the presumption to aid the plaintiff. The Court stated at page 882:

“*Res ipsa loquitur* does not apply. It does not appear that the injury was not caused by a voluntary act of appellant. (*Ybarra v. Spangard*, 25 Cal. 2d 486, 491 (154 P. 2d 687, 162 A. L. R. 1258).) From the events recited above, and from the allegation that the appellant went upon the bleachers to pull the cover down, it would ~~not~~ be irrational to conclude that his voluntary act was the cause.”

It is respectfully submitted that there is no reasonable basis for distinction between the *Beatty* case and the case at bar. The decedent was in sole and exclusive control of the jet aircraft. The facts have already been set forth relating to his failure to have a current instrument card; the fact that he himself could have caused the throttle burst which in turn would cause the flame-out; the fact that he himself could have accidentally have cut the fuel supply; the fact that he himself could have accidentally or otherwise hit the very sensitive stick, causing it to move in the wrong direction; the possibility that he may have fainted or blacked out; his relative inexperience with jet aircraft; his takeoff under circumstances involving an instrument flight where he had not warmed up the plane sufficiently to stabilize his instruments; and evidence that would indicate that the trim actuator was improperly set. Other possibilities have been set forth at an earlier point herein.

Any or all of these things, plus other conduct which, of course, would be unknown to anyone connected with this litigation, may have caused the crash in question.

These cases are in keeping with the fundamental principle that the presumption of due care cannot be used by a plaintiff to *establish* negligence. Thus the Court states in *Keiper v. Northwestern Pac. R. Co.*, 134 Cal. App. 2d 702, 286 P. 2d 47:

“It is true that respondent is entitled to the presumption that deceased was exercising due care for his own safety, but as a corollary it does not follow that indulgence in this presumption leads to the conclusion, or presumption, or even inference, that appellant was negligent, or that this negligence was the proximate cause of death.” (Page 711.)

See, also:

Looney v. Metropolitan R. Co., 200 U. S. 480, 26 S. Ct. 303, 50 L. Ed. 564.

II.

The Evidence Fails to Establish as a Matter of Law That Any Claimed Negligent Act or Omission on the Part of the Appellant Was a Proximate Cause of the Wrongful Death of the Decedent.

Negligence, in order to be actionable, must be the proximate cause of the injury. The burden rests upon the appellee to prove that any claimed negligence was the proximate cause. The fact that the defendant's negligence could possibly have been the cause is not sufficient.

Spencer v. Beatty Safway Scaf. Co., 141 Cal. App. 2d 875, 297 P. 2d 746.

A verdict cannot be based upon guess or conjecture.

Reese v. Smith, 9 Cal. 2d 324;

Puckhaber v. So. Pac. Co., 132 Cal. 363.

Despite the existence of this presumption and despite the fact that there was evidence that there was a defect in the cable holding the lid, the Court in the case of *Spencer v. Beatty Safway Scaf. Co.*, 141 Cal. App. 2d 875 (*supra*), held that the doctrine of *res ipsa loquitur* did not apply. The pertinent portions of this Court's opinion in this regard, affirming the manufacturer's judgment notwithstanding the verdict, is set forth in Appendix E. It is submitted that this case is on all fours with the case of *Spencer v. Beatty Safway Scaf. Co.*, 141 Cal. App. 2d 875. Both are manufacturer's liability cases. Both are cases where the party handling the instrumentality was entitled to the presumption of due care. Under the facts of this case it would be the sheerest and rankest speculation to assume that any possible trivial defect or flaw which might have existed in the jet plane was proven to have any causal relationship to its subsequent crash.

III.

The Trial Court Erred in Denying Appellant's Motion for a Judgment Notwithstanding the Verdict.

It should be apparent from the discussion which has preceded in connection with the previous points that there is not a scintilla of evidence of negligence on the part of the appellant manufacturer. There is no legal basis for the application of *res ipsa loquitur* to this case. Under these circumstances the imposition of liability by a lay jury was obviously based upon sympathy, passion, prejudice, or upon the rankest kind of speculation. The trial court itself was unable to visualize any evidence of negligence in the record, yet denied all of appellant's motions. For the reasons that have heretofore been pointed out, it is submitted that the trial court committed error and that

this court, in accordance with its power, should order the judgment reversed and should grant the appellant's motion for a judgment notwithstanding the verdict.

Conclusion.

To use the language of Justice Holmes in *Kansas City So. Ry. Co. v. Jones*, 276 U. S. 303, 72 L. Ed. 583:

“Nothing except imagination and sympathy warranted a finding that the death was due to the negligence of petitioner. . . .” (p. 305).

It is respectfully submitted that the utter failure to establish any probative facts revealing any negligence on the part of appellant compels a reversal of this cause and that the Court should enter judgment notwithstanding the verdict.

Respectfully submitted,

CRIDER, TILSON & RUPPE, and
HENRY E. KAPPLER,

Attorneys for Appellant.

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APPEN. A.





APPENDIX B.

Portions of testimony of Frank C. Smith, inspection test pilot for North American:

Q. Was it a condition of weather that would require the use of instruments?

A. It was, very definitely.

Q. Just how would you use instruments in those conditions?

A. Well, in this particular case, it is probably one of the worst type of instrument weather. The pilot had blue sky overhead on take-off, and yet he had a reduction of visibility, possibly was not aware of the fog at the end of the runway, the visibility was that poor, and yet during the take-off, as soon as he got the gear and the flaps up, he went immediately into this white fog bank, and if he had not been aware of the fog bank's presence, he could possibly have been flying what has been referred to as VFR or visual flight rules, with visual reference to the ground, and as soon as he got into the fog bank, you can become immediately disoriented. You have no reference or no way of knowing, that is, by looking outside, the attitude of the aircraft, or altitude, and it takes a matter of a few seconds to check your flight instruments to be sure that they are doing as you want them to and that they were set properly prior to take-off.

The Court: Let me ask you a question. You are taking off and you are going from a clear field into a foggy field. You pull your stick back in order to rise. If you go into the fog bank, you still keep your stick in the same position, don't you?

The Witness: That is entirely possible. However, it takes very little reaction on the control stick to get reac-

tion on the aircraft. The aircraft, by virtue of the fact that they are a fighter type aircraft, are very sensitive to control pressure.

The Court: I know, but if you are on a take-off and going up and you go into a fog, why would anybody try to change the stick?

The Witness: I think I could clarify that for you slightly. There are conditions under which the aircraft controls are set prior to take-off, what is known as a take-off trim condition. At that time we have indicator lights in the aircraft which show when the aircraft controls are in their proper condition and attitude for a normal take-off, and the control pressures are such that the aircraft will almost take off by itself, with the controls being set where they are. There will be very little control pressures required on the airplane.

It is not absolutely necessary for the pilot to take off to actually apply a manual pressure back on the stick to get it into the air. We probably do it as a matter of practice, but designwise in the aircraft it is not required.

The Court: You are going down the runway. You leave the runway and you go into the air and you go into a fog bank. You are rising.

The Witness: Right.

The Court: Why should there be any change in direction?

The Witness: You will have to qualify your rising slightly. In the jet aircraft, sir, on your take-off it is customary and normal procedure to let the aircraft accelerate to a great speed before you are actually rising. His rate of climb might be a matter of a few hundred feet per minute at his particular time when he was entering the

fog bank. He did not have a large vertical component in his flight at that time. He was flying quite low at the time.

The Court: Well, he was 25, 30, 100 feet off the ground.

The Witness: Well, let's see. Assuming that he had left the runway there, it is almost a mile and a half long, and in this mile and a half of distance, he had risen 25 feet. That is not very much of a vertical component to his horizontal component.

The Court: Well, if he stayed 25 feet above the ground, he wouldn't have crashed.

The Witness: That is correct. However, you must realize at 200 knots and still accelerating, he is traveling almost 300 feet per second, and it doesn't take much of a control reaction at 25 feet to get him back into the ground. Even from the time of his transition, he is taking off the ground with his hand on the control stick, and simply moving his eyes from outside contact to try to orientate himself in the cockpit to his flight instruments, a subconscious movement of the hand would be sufficient.

Q. (By Mr. Tilson): Well, it is then necessary and proper to use instruments in going through that fog bank?

A. It is entirely required. In the Air Force, our worst possible accident-involving condition is caused by pilots trying to fly visual flight rules under instrument flight rule conditions, where the pilot is actually trying to maintain contact with the ground when the conditions do not warrant such a thing.

The Court: This was an instrument flight, was it not?

The Witness: This was in instrument flight. However, on his take-off run, he did have visual contact with the ground. Your visibility was a rapidly decaying situation. Although he may have had a half-mile visibility on the take-off role in the beginning of his run, it decayed down to a matter of 20 or 30 or 50 feet at the time he was airborne, so if he was 25 feet in the air and had about 40 feet of visibility or visibility of 40 yards, he didn't see very much of the ground.

I might qualify this instrument take-off compared to this VFR take-off, your Honor.

The Court: All right.

The Witness: If a pilot is under actual weather conditions where he does not have visual contact with the ground, as a true instrument flight might be, he will take off with immediate and due reference to his visual instruments, and there is no transition from visual flight to instrument flying. He is monitoring his instruments at all times and, therefore, there is not, you might say, the moment of mental shock from the time he has taken off and he is enveloped by the clouds, until he has got to get on to his instruments to make a proper reaction required to be sure the airplane is maintaining his climb.

Q. (By Mr. Tilson): What instruments come into play in that sort of an instrument take-off?

A. You have several. First off, you have the directional gyro, which is a magnetic compass which is gyroscopically stable to maintain a true heading or maintain a heading of the aircraft. This tells him which direction he is going, that he is going in the heading he intended to go.

You have the artificial horizon, which is another gyroscopic instrument, and this horizon, artificial horizon, sim-

ulates the aircraft's attitude with reference to an artificial horizon as it would appear if the pilot could see where he is going.

He also has a rate of climb indicator or a vertical climb indicator, which tells him how fast he is climbing or coming down in a matter of feet per minute.

He also has a bank and turn indicator which supplements all the rest of the instruments and tells him whether he is flying straight or turning and at the rate of which he is turning, and whether his aircraft is slipping or skidding in the air.

That is simply the primary group. It can be more elaborate.

APPENDIX C.

B. A. J. I. No. 218. Duty of Manufacturer. The manufacturer of a product that is either inherently dangerous or reasonably certain to be dangerous if negligently made, owes a duty to the public generally and to each member thereof who will become a purchaser or user of the product. That duty is to give an appropriate warning by label or otherwise of any known dangers which the user of the product ordinarily would not discover and to exercise ordinary care to the end that the product may be safely used for the purpose for which it was intended and for any purpose for which its use is expressly or impliedly invited by the manufacturer. Failure to fulfill any such duty is negligence.

When in the manufacture of such a product use is made of any material or part obtained from a source outside the manufacturing plant in question, it is the duty of the manufacturer to make such inspections and tests of that imported material or part as ordinary prudence would indicate to be necessary, to the end that the safety of the finished product for the intended or invited use will be reasonably certain. Failure to fulfill that duty is negligence.

On the other hand, if the manufacturer performs that duty, and the inspections and tests do not indicate a defective or dangerous condition, and it does not know of such a condition, it is not liable for injury resulting from its use of such material or part, although it proves to be defective.

APPENDIX D.

In *Cohn v. United Air Lines Trans. Co.*, 17 Fed. Supp. 865, the Court at pages 867 and 868, in refusing to apply the doctrine of *res ipsa loquitur*, stated as follows:

“Our daily newspapers are replete with airplane accidents, the solution of which will never be known, as in the case at bar. The Department of Commerce, through its Bureau of Air Commerce, had published documents purporting to deal with accidents in the air and their causes. In publications of July and August, 1935, the causes of accidents attributable to carelessness or negligence are but a small percentage of all the causes which are known in the young but growing enterprise. It is definitely known that the presence of air pockets, cross currents, clouds, fog, mist, and a variety of climatic conditions, bring about disaster for which no one is responsible, except it might be said that he who assumes to fly must look well to his own fate. Stalling motors frequently bring about failures to negotiate the air. Experience teaches us that this is still common in the automobile motor, which has the same method of propulsion as that of the airplane, but with a much longer period of experimentation and development. Of course, when the motor in an auto stalls, it generally causes nothing more serious than disappointment, inconvenience, and vexation to the driver and occupants; but when the motor of an airplane stalls when in the air, it is very likely to mean death to the occupants. Only a few of the ordinarily recognized natural hazards of flying which have not yet been definitely overcome, have been mentioned. How can the court legitimately say under all the circumstances that a fall of an airplane upon a test flight was through an exclusion of all of other causes, at-

tributable to the negligence of the ones engaged in the operation? And in the face of this, the law tells us that the doctrine of *res ipsa loquitur* shall not be applied if there is any other reasonable or probable cause from which it might be inferred that there was no negligence at all. It seems impracticable, if not impossible, in the case at bar, to reasonably apply the doctrine to the pleaded fact and thereby save the petition.”

APPENDIX E.

(From *Spencer v. Beatty Safway Scaffold Co.*, 141 Cal. App. 2d 875, at 880, 881 and 882.)

“ . . . But conceding the freezing of the cable to have been due to the negligence of Beatty, mere proof of negligence on the part of a defendant does not complete the circuit of proof of his liability. To make him legally liable, *the negligence of the defendant must be fastened to the injury. If it is not, a judgment against him is not justified.* (*Puckhaber v. Southern Pac. Co.*, 132 Cal. 363, 364 (64 P. 480). See also *Greene v. Atchison, T. & S. F. Ry. Co.*, 120 Cal. App. 2d 135, 140 (260 P. 2d 834, 40 A. L. R. 2d 873); *Neuber v. Royal Realty Co.*, 86 Cal. App. 2d 596, 630 (195 P. 2d 501); *Reese v. Smith*, 9 Cal. 2d 324, 328 (70 P. 2d 933).) Where the negligence proved is not connected with the injury, “the case stands exactly as if no negligence had been proven.” (*Ibid.*, *Puckhaber v. Southern Pac. Co.*, p. 365). * * * But there is no evidence of what happened just prior to the lid’s falling. Since he suffered amnesia, he is presumed to have been acting with due care for his safety. (*Smellie v. Southern Pac. Co.*, 212 Cal. 540, 562 (299 P. 529); *Ellison v. Lang Transp. Co.*, 12 Cal. 2d 355, 359 (84 P. 2d 510).) That presumption followed him throughout the trial and it was never overcome by positive evidence. Hence, by that presumption of due care, appellant is relieved of the charge of contributory negligence. * * * When the plywood cover stands almost vertical, it is held so by the cable while the bleacher is extended which in turn is held taut by the screws in the wall. Unless those screws came out, the cover could not fall. It is possible that appellant lost his balance as he leaned from the top seat on

section 6 to crank the winch above section 5, and in falling grabbed the cover and went down with it. If he did that, or anything else to cause him to fall, although not negligence, such possibility or some act of his caused him to fall and in his falling to pull the cover down and that fall and his pulling the cover with him or some other act of his was the sole proximate cause of the tragedy, unless the doctrine of *res ipsa loquitur* is applicable. Certainly, the accident can be traced to no negligence of the defendants or any of them. *Before negligence is actionable, a causal connection must be shown to have proceeded in unbroken course from the so-called negligent act to the injury.* * * * *Res ipsa loquitur* does not apply. It does not appear that the injury was not caused by a voluntary act of appellant. (Ybarra v. Spangard, 25 Cal. 2d 486, 491 (154 P. 2d 687, 162 A. L. R. 1258).) From the events recited above, and from the allegation that appellant went upon the bleachers to pull the cover down, it would not be irrational to conclude that his voluntary act was the cause. At the most, it cannot be said that the probabilities weigh in favor of Beatty's negligence as the proximate cause of appellant's falling beneath the bleacher's cover. In such event, *res ipsa loquitur* does not apply. (La Porte v. Houston, 33 Cal. 2d 167, 169 (199 P. 2d 665); Zentz v. Coca-Cola Bottling Co., 39 Cal. 2d 436, 442 (247 P. 2d 344).) Moreover, in view of the law that the doctrine of *res ipsa loquitur* is not applicable (1) unless the negligent act was caused by an agency or instrumentality within the control of the defendant and (2) must not have resulted from a voluntary action of the plaintiff (Ybarra v. Spangard, *supra*, p. 489), it is here recalled that Beatty's last control over the bleachers and winches was April 30, 1952; that thereafter they were for eight months under the exclusive control of the board of education and its agencies. Also, during that period, appellant was, himself, the very agent who operated and cared for the gymnasium equipment. * * *

No. 15,292

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NORTH AMERICAN AVIATION, INC., a corporation,

Appellant,

vs.

WANDA LEE HUGHES and RANDALL L. HUGHES, a Minor,
by his Guardian *ad Litem*, HARRY SUTTON,

Appellees.

APPELLEES' BRIEF.

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No. 15,292

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NORTH AMERICAN AVIATION, INC., a corporation,

Appellant,

vs.

WANDA LEE HUGHES and RANDALL L. HUGHES, a Minor,
by his Guardian *ad Litem*, HARRY SUTTON,

Appellees.

APPELLEES' BRIEF.

I.

STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING JURISDICTION.

Pleadings consist of the Complaint and the Answer of Defendant North American Aviation, Inc., a corporation. Jurisdiction is based upon diversity of citizenship. Appellees (plaintiffs) are residents of the State of Ohio [R. 4, 102]. Appellant (defendant) is a Delaware corporation maintaining its principal place of business in the County of Los Angeles, California [R. 4]. The amount in controversy exceeds \$3,000.00. The United States District Court had original jurisdiction of the action pursuant to the Constitution of the United States and Title 28, U. S. C., Section 1332(a).

The action is for the wrongful death of Fred L. Hughes a pilot in the United States Air Force. It was brought by his widow and infant son. The case was tried by jury and resulted in a verdict in favor of the widow and infant son in the sum of \$125,000.00 on May 24, 1956 [R. 88]. Appellant filed a motion for judgment notwithstanding the verdict or for a new trial on May 25, 1956 [R. 88]. The court denied both motions on June 13, 1956 [R. 94]. Judgment on the verdict was filed June 4, 1956 [R. 93]. Notice of Appeal was filed July 2, 1956 [R. 95]. Jurisdiction of the United States Court of Appeals is based upon Title 28, U. S. C., Section 1291.

II.

STATEMENT OF THE CASE.

A. The Questions Involved and the Manner in Which They Are Raised.

Appellant listed five points on appeal [R. 884] and four specifications of assignments of error (App. Br. 22) and discussed these under three points in argument. In reality there is only one question, which is whether there is evidence to sustain the verdict of the jury.

In answer to this question Appellees will point to the substantial evidence which supports the verdict and will discuss the facts and applicable law under appropriate separate headings.

B. Introduction to Statement of Facts.

The evidence was conflicting in many details. The testimony of witnesses was frequently contradictory. There is no way that all of the testimony and all of the exhibits can be reconciled to represent one version of the tragic story of Lt. Hughes' death.

An attempt was made, however, to lay before the jury all that was observed by those who saw or heard the accident and all the knowledge that could be gleaned from the wreckage by experts. Those who testified as to what they saw or heard, saw or heard it from different positions and angles. Their testimony conflicted. The experts who combed the wreckage couldn't find all of the parts [R. 612, 719, 743] but testified generally that from the parts they did find, they could discern no *evidence* of malfunction or mechanical failure of the airplane. In arriving at their conclusions, the testimony of eye-witnesses was either not considered [R. 747, 748, 761] or completely discounted by the experts in favor of their observations of the remains [R. 748, 749, 761].

If only the testimony of the expert witnesses were considered and the testimony of the eye-witnesses disregarded entirely, there is a good chance that we would get the impression that the plane is capable of reassembly to operable condition because no mechanical fault can be found. A glance at the photographs brings a quick return to reality and a tendency to discount the assurance with which the experts purport to speak.

This thorough and substantial conflict does not appear from the recital of facts by Appellant. Appellant's statement of facts is like defendant's argument to the jury. It lacks the objectivity which a statement of facts in an appellate brief should contain.¹

¹"Where an appellant claims that some particular issue of fact is not sustained by the evidence, he is required to set forth in his brief all of the material evidence on the point and not merely his own evidence."

Slovick v. James I. Barnes Construction Co. (1956), 142 Cal. App. 2d 618, 622, 298 P. 2d 923.

It is necessary for Appellees to make a statement of facts to show not only the conflict which the jury had to resolve, but also to show that there was substantial evidence to support the jury's verdict. In making this statement, Appellees bear in mind the rule on appeal that conflicts must be resolved in aid of the judgment (*Worcester Felt Pad Corp. v. Tucson Airport Authority* (C. A. 9th, 1956), 233 F. 2d 44).

Some of the facts which are greatly stressed by Appellant have very little importance because regardless of how the conflicting evidence is viewed, the fact, when established, cannot be considered as a proximate cause of the accident. These are nevertheless mentioned in the following statement of facts and their lack of application is explained in argument.

C. Statement of Facts.

1. Decedent, First Lt. Fred L. Hughes, Was an Experienced Pilot.

Fred L. Hughes was a First Lieutenant in the United States Air Force and an experienced pilot. At the time of his death he was 25 years old [R. 110], a college graduate [R. 111], married [R. 103], and the father of an infant son [R. 106]. He was a veteran of 100 combat missions flown in jet aircraft in a foreign theatre [R. 103, 108, 132, 140]. He flew 144 hours combat time [R. 143]. His decorations included the Distinguished Flying Cross and Oak Leaf Clusters [R. 108, 112].

His experience included combat in the F86F airplane, the same type of plane in which he met his death on December 18, 1953 [R. 142]. He had been qualified for instrument flight for three years [R. 141]; in fact, he had been an instructor in instrument flying [R. 122, 144,

146]. He held a white card authorizing instrument flight since 29 November, 1951 which had been constantly maintained and never suspended [R. 154], but at the time of the accident this card was not current [R. 155]. From the 19th of April, 1953 to May of 1953 he was suspended from flying for unspecified physical reasons [R. 138]. Such suspension may result because the flyer has developed a cold [R. 138].

Two types of cards are issued by the Air Force, a green card and a white card. A pilot holding a green card may issue his own clearance for take-off while the holder of a white card must obtain clearance from the command of the air field [R. 154, 155]. One of the qualifications for a green card, according to Appellant's witness, is 100 hours of instrument time [R. 545]. First Lieutenant Hughes had 137 hours of instrument time prior to December 18, 1953 [R. 153]. In this respect, according to Appellant's witness, he met the qualifications for holding a green card. This is the only material point because Appellant's comments on this subject are intended to discredit the experience of decedent in instrument flight. Appellant states that the required instrument time for a green card is 500 hours, referring to the place in the record where the requirement is said to be 100 hours. At another point in the record, Appellees' witness stated that a green card required 500 hours of instrument time [R. 140].

By footnote on page 5 of its brief, Appellant contrasts the experience of the test pilots who testified for and were employees of Appellant. Their time in the air is impressive, but the most pertinent and probably the only comparison in context was omitted. Test pilot Kinkella, who held a green card, had approximately 150 hours of instrument time [R. 540]. Two things are apparent from

this fact: First, in all probability only 100 hours of instrument time is required for a green card and certainly not 500 hours, and second, First Lieutenant Hughes with 137 hours of instrument time as against Kinkella's 150 hours looks rather experienced in instrument flight. The record did not disclose the instrument time of the other test pilots who testified, so there is no way to make a comparison.

At the same time, the record shows that he was ordered from his station at Nellis Air Force Base to Los Angeles Airport to fly a new F86F jet aircraft back to his base. At the Los Angeles Airport, he was under the orders of the field military authorities. There was someone from the Army to direct him to take off and the civilian authorities wouldn't clear him without military approval [R. 155, 439]. He filed his flight plan and obtained clearance from military headquarters [R. 443]. An attempt to show the subsequent take-off was a violation of regulations resulted in questions by the court at several points [R. 546-548, 631-632] pointing up the conflict between military authority over subordinates and the regulations relating to the possession of white or green cards which were at one point likened to a rank [R. 140].

2. The Weather Conditions Were Normal for Los Angeles International Airport.

Visibility was officially fixed at one-half mile [R. 436]. The air traffic moved all afternoon both before and after the accident without interruption. Hundreds of planes of every type and including military, private and commercial planes came and went on schedule [R. 442].

The Weather Bureau established that officially visibility was one-half mile by observations taken of known objects at known distances from established observation points [R. 436]. The restriction to visibility is classified as

smoke and haze [R. 437] and this was only 300 feet thick [R. 438]—certainly not an unusual condition [R. 442]. There was a discrepancy between this official weather observation and the observations of some of the eye-witnesses to the accident, some of whom made their observations at a distance in excess of half a mile. This will be specifically mentioned below.

The only flights which the record discloses were canceled on December 18, 1953, because of weather, were the test flights of new military aircraft manufactured by North American Aviation, Inc., the Appellant [R. 307]. This was because there is an Air Force regulation which provides that no test flights can be made unless visibility is three miles or more [R. 307, 315]. On the other hand, no such limitation existed on flights for delivery of aircraft after completion of test flights [R. 319]. As a matter of fact, three deliveries were scheduled for December 18, 1953, and one was actually made about one hour before the accident in which First Lt. Hughes lost his life [R. 798]. The Chief Test Pilot did not know whether the third one took off or not [R. 798].

At the time of the accident fog had begun to come in from the ocean at the West end of the runway [R. 423]. The weather report which was issued two minutes before the accident did not note this. Witnesses testified as to the nature and extent of this fog.

Although visibility was restricted at the Los Angeles Airport, the weather was good. A fog condition was moving in at the far end of the runway, but whether the fog was dense or spotty with only occasional limitations on visibility depends upon the observation of the various witnesses. It was for the jury to determine the condition of the weather from the point of view of the pilot.

The evidence on the weather and concerning flight clearance and take-off instructions is covered in detail in the appendix (Appendix A). Appellant's statement of facts is woefully inadequate to reflect the variety of the testimony. Even the jury could not have summarized the evidence with the convenient brevity used by Appellant.

3. Neither the Instruments nor the Jet Engine Needed to Be Warmed Up.

There is no question of the fact that the jet engine in First Lt. Hughes' plane did not require a warm-up before taking off. In this respect jet engines differ from piston-driven engines used in what are now considered conventional aircraft.

Appellant states in its brief, page 6, that when instrument flight is contemplated, a five minute warm-up is required. Some of the witnesses used this expression. However, the actual fact of the matter was explained by Appellant's Chief Production Test Pilot, Mr. George Annis. He explains that the instrument in question is the vertical gyro horizon. This is an electrical instrument. When the switches are on, the gyro is operating. It takes five minutes for the gyros to come to speed to give a proper indication on the instrument [R. 456]. In other words, the warmth of the engine has nothing to do with the matter because the gyros operate electrically and are not dependent upon the operation of the engine.

The jury was told not only that thousands of these jet planes had been delivered and that Test Pilot Annis alone had flown 3 to 4 thousand flights in them without power failure or flame-out, but that in general they were as safe to operate as conventional aircraft [R. 325].

4. The Plane Was in the Exclusive Possession, Custody and Control of Appellant Until First Lt. Hughes Stepped Into the Cockpit.

It is an undisputed fact that Appellant manufactured the airplane, tested it for itself and then tested it for the Air Force and accepted it for the Air Force [R. 314, 320]. The acceptance flight for the Air Force was conducted by an employee of Appellant, who noted that certain adjustments had to be made after his flight in the airplane and then accepted the plane on behalf of the Air Force [R. 314]. The plane was not flown after these final adjustments were made and before the flight of First Lt. Hughes [R. 527].

5. There Was Evidence of Carelessness in the Process of Manufacturing and of Inspecting the Airplane.

A point not mentioned by Appellant in its Section E under Statement of the Case, page 7, Appellant's Brief, on inspection made of the aircraft prior to delivery, is the fact that the inspection disclosed that in the course of manufacturing the aircraft a fire had broken out in the electrical system and had been extinguished leaving a residue of foamite, a fire extinguisher fluid [R. 810]. The testimony was as follows:

“Q. . . . Would you go back to L-4? I overlooked a couple of items. Would you read No. 3 on on that, 89, item 89 on that L-4? A. Due to use of foamite cleaner, it looks like, or due to use of foamite, clean all relay boxes and terminal connectors, such as reverse current relay, field current relay, armament relay, and so on.

Q. What does that mean, Mr. Clayton? A. The only reason there would be any foamite in there would be if we had an electrical fire in the assembly.

Q. That means they had a fire there and put it out, isn't that right? A. It reads that way.

Q. Isn't that the final check-out sheet, squawk sheet, for the electrical system? A. No. This is down in the final assembly. This isn't the final squawk sheets of the airplane.

Q. This is the final assembly? A. That's right."
[R. 810-811.]

There was no explanation as to the reason for the fire or any testimony that the reason had been corrected. The only information seems to be that the fire was extinguished and the residue of foamite was cleaned away from the electrical wiring involved.

6. The Instrument Known as the Vertical Gyro Horizon Had Time Enough to Stabilize Before It Could Have Been Needed.

Apparently one electrical instrument which is used when flying without visual reference to the ground requires about five minutes before it has stabilized for use. The evidence is that this instrument is in operation when the electric switches are turned on [R. 456]. It is not dependent upon the operation of the engine.

Two witnesses testified concerning the sequence of events between the time when decedent entered the cockpit and the time he started down the runway for take-off. These two were the security officer and the crew chief.

The crew chief, Rinaldi, testified that he performed an inspection of the aircraft, checking the whole aircraft and preparing the plane for flight [R. 399] and that he then helped First Lt. Hughes into the plane [R. 406, 415] and watched the pilot check the cockpit generally [R. 414]. He stayed on the wing until after the engine

was started by the pilot and was running [R. 400, 415]. He stayed on the wing for a minute or a minute and a half after the pilot got in and closed down the canopy. The engine was running during all of that time [R. 428]. He then got down and stood in front of the plane [R. 414]. He testified that it was a few minutes after the pilot started the engine before the plane started to go to the end of the runway [R. 425]. He said that he imagined that it took a few minutes to get down to the end of the runway, but that he did not know exactly how long it took [R. 411], and that when the plane reached the end of the runway, the pilot stopped for maybe 10 seconds [R. 425].

The testimony of the other witness conflicts in part with the foregoing but indicates that more than 10 seconds was spent at the end of the runway.

The security officer, Beaudry, testified that the decedent checked the plane externally, put on his parachute, climbed into the cockpit and brought his canopy to the half-way mark, started his engine and in 10 or 15 seconds after he started his engine he started to taxi down to the end of the runway [R. 574]. He revised this estimate by saying that it was less than a minute [R. 574]. After the plane reached the end of the runway, the engine was reved up twice and the witness then testified, "then he threw it back against the wall again and started to roll down the runway" [R. 575].

7. The Take-off Was Normal and at Full Power and the Plane Was Last Seen in an Attitude of Climb.

Rinaldi, the crew chief, was the only witness who testified that he did not believe that the engine was rotating at full throttle. The security officer, Beaudry, testified

that it was [R. 580] as did William Pitts [R. 641, 644]. Test pilot Smith testified to the same effect [R. 519] and Clifton B. Massey, who was a representative of General Electric Company, the manufacturer of the engine, who was at the North American plant at the time, concurred [R. 702]. Support for this version is found in the testimony of the various experts who examined the wreckage and who testified that the engine was operating at a high RPM at the time of the accident [R. 666, 667, 672, 716, 717, 718].

The point at which the plane left the runway or broke ground, as it is frequently characterized in the transcript, was fixed by Kunzler at approximately Sepulveda Boulevard [R. 556]. Sepulveda Boulevard is approximately 4,000 feet East of the West end of the runway [R. 556]. He went on to testify that while on crash truck duty, it was his job to watch all planes take off [R. 556] and that at the time that the plane passed directly in front of him, he estimated that it was about 75 to 100 feet off of the ground [R. 556-557]. It then disappeared in the fog, a trifle West of Hangar 9 [R. 557]. The distance between Hangar 9 and the crash truck at this moment was approximately 900 feet so that the plane was airborne for approximately 2,900 feet while witness Kunzler watched it from the crash truck.

William Pitts saw the plane before it entered the fog. He was standing between Hangars 8 and 9. He testified that he would judge the plane to be about 100 feet in the air at the greatest height while he was observing it. The wheels had been retracted and the flaps were up and the doors closed. He then testified that "the airplane was in a nose-high attitude; however, it didn't seem

to be climbing much" [R. 641]. He later testified as follows:

"Q. At that time it had an attitude with the nose higher than the tail? A. That is correct.

Q. Which indicated it was climbing? A. Well, it indicates he was in an attitude in which he intended to be climbing, yes, Sir.

Q. An attitude for climbing, we will put it that way. A. Yes, Sir." [R. 645.]

Beaudry testified that when he last saw the plane it was on a very shallow upward climb [R. 576].

8. There Is Evidence That There Was a Flame-out, an Explosion in the Air, a Fire in the Air and Then a Crash.

The force which drives a jet plane forward is the flame from the jet engine. When the flame goes out, referred to as a "flame-out," the aircraft is without power. Appellant's most experienced test pilot testified that in the event of a flame-out on take-off, the approved procedure would be to stop the throttle and land straight ahead [R. 470], pointing out that when a pilot actuates the air start switch, he takes away the electric power of many other items in the aircraft and would lose the functioning of instruments, radio equipment and miscellaneous other gear while the switch is off [R. 467-468]. He pointed out that the speed for take-off in an F86F with external 200-gallon tanks attached will be in the neighborhood of 130 knots [R. 469] or approximately 150 miles per hour. Test pilot Smith testified that the pilot is required to get the gear and flaps up for structural reasons before 185 knots and that the take-off is completed at near 200 knots [R. 511] or approximately 230 miles per hour.

Two witnesses testified that there was a flame-out. The Incident Report, Exhibit 2, in evidence, which was introduced without objection of appellant, states:

“Subsequent reports from the City Operations personnel, from North American Aviation supervisors and from the City Fire Department personnel indicate the aircraft, a jet, had an apparent flame-out at approximately 100 feet altitude and had crashed on the west end of Runway 25L and had passed through the west airport fence, over Lincoln Highway and came to rest in the field adjacent to the airport, approximately 500 feet west.”

Appellant's test pilot Frank C. Smith was in the flight office and saw the aircraft on take-off [R. 518]. He saw nothing out of the ordinary [R. 513] and it sounded as if the plane were on full throttle [R. 519]. He observed the aircraft as it passed the window. He lost sight of it in the obscuration and as he was returning into the lounge area heard the engine stop and an explosion followed immediately. He looked out and saw black smoke coming up through the fog [R. 524-525].

Mr. Kunzler, who was in the crash truck, heard a thud and at the same time heard the engine quit [R. 558] and then saw a large column of smoke come up through the top of the fog and after that heard another thud which he characterized as a rumble which he said was like an earthquake rumble. “The ground was shaking” [R. 558]. He did not hear an explosion [R. 559].

Three witnesses saw the airplane in the air after it had entered the fog. Witness Rogers saw the plane airborne 25 to 40 feet in the air before it had gotten to the end of the runway. There was a loud explosion and a big burst of flame and after that all he could hear was

metal, but he couldn't see on account of the fog [R. 180]. He could see the outline of the ship in the fog and when he first saw it, it was just a great big ball of fire [R. 181].

Walter Spencer was on Lincoln Boulevard when he first heard an explosion and then saw the plane when it dipped about 30 feet East of the fence on Lincoln Boulevard and seemed to hit the ground and then blow up. He noticed smoke prior to the time it hit the ground [R. 192]. He reiterated that he saw smoke before it hit the ground [R. 195]. It careened across the road and out into the field beyond [R. 192].

Witness Callagy was going North on Lincoln Boulevard and was 150 to 200 yards South of the scene of the accident [R. 185]. He saw the plane very shortly before the accident halfway between the end of the runway and the fence. It was airborne at the time. It looked as though it was coming in for a belly landing. The front was a little higher than the back and it wasn't over 4 or 5 feet off the ground at the most [R. 186]. Flame was coming out of the aft section of the airplane from both sides of the wing back to the tail section [R. 186]. The landing gear was up and he noticed that there were wing tip tanks, one on each wing [R. 189].

Witness William Pitts testified that he heard an explosion and that the engine stopped at the same time [R. 645].

Conflicting evidence came from opinion witnesses who testified that their examination of the wreckage disclosed no evidence of the flame-out and in some cases that it was their opinion that there was no flame-out [R. 695, 696, 705]. These opinion witnesses had arrived at their conclusions either without the benefit of the testimony of

the eye-witnesses or this testimony was completely discounted on the ground that there was no physical evidence of flame-out [R. 748, 749, 761].

9. The Opinions of the Experts Had No Affirmative Foundation, but Were Based Upon a Failure to Find Evidence of Mechanical Failure.

As pointed out in Appellant's Brief, the aircraft was completely demolished in the accident. One of the pilots was unable to identify certain parts because as he explained, "This airplane is in pretty bad shape" [R. 481-482]. The experts who investigated the wreckage to attempt to determine the cause of the accident were "unable to make an operational check of the normal hydraulic system, the normal control system, hydraulic pump, as the power take-off unit, or power take-off section of the engine was badly damaged, and the pump shaft was sheared." They were able to find only part of the pressure switches. Some found were so badly damaged that laboratory check was precluded. The valve that controls the fuel into the engine was never recovered [R. 612, 719]. A great portion of the hydraulic system was broken in pieces and burned so that they could not be examined [R. 779-780].

There is no evidence of any attempt made to trace the electrical system. The flight control system is operated hydraulically. The main hydraulic system obtains its power from the engine [R. 743]. This system was too badly damaged to be examined. The alternate hydraulic system is electrically operated. The boost pumps which force most of the fuel to the engine are electrical and a failure of a connection or a disconnection of electric current would cause these pumps to fail [R. 473]. Failure of the electrical system could also affect the flight control system if

the main hydraulic system were not operating. The experts testified that the investigation showed that the alternate system was not in operation, but it also showed that the manual emergency changeover handle was found to be within $\frac{1}{4}$ of an inch of full changeover position from the normal to the emergency system [R. 616].

A hole in the cowl and another hole in the floor appear in the photograph, Exhibit 5 [R. 481-482]. The metal bulged out toward the cockpit [R. 765-766].

The airplane was traveling in a westerly direction at the time of the accident and it crashed 125 feet West of the end of the runway and apparently bounced across Lincoln Boulevard and lit again East of the highway where it broke up. The persons investigating the accident made a map showing where parts of the plane were found. This map discloses the following information: 325 feet East of the point of first impact a tail pipe clamp piece and a DZUS fastener were found. 200 feet Easterly of the point of impact a nut and a piece of bolt were found. Approximately 225 feet Northeast a piece of tail pipe bracket was found. Approximately 200 feet Northeast a nut and a piece of bolt were found. 150 feet Northeast a steel bolt, a piece of engine accessory case and a piece of tail pipe bracket were found. [See Exhibit E.]

Two witnesses testified that the law of inertia would tend to carry any part which fell from a plane in a forward direction or in this case in a Westerly direction [R. 688, 750, 751, 752]. It seemed to be the theory of the experts that the 200-gallon drop tanks on the wings of the airplane exploded at the point of first impact. These two tanks can be seen in photographs, Exhibits G-2, G-6 and G-7. They are free of the plane and substantially intact. Expert Joseph Hoffman testifying as to the fuel system

stated with reference to the tanks that they were thrown clear of the ground fire and that he found in one of them a small pocket of fuel [R. 714-715], which is not indicative of an explosion.

Investigation of the ground shows the points of first impact and witnesses testified that the marks made indicate that the plane came in at a very steep attitude and that it does not indicate any attempt to land in a flat attitude. The explanation offered is that they were able to find a trim actuator which was taken into the laboratory and measured and through layouts and drawings computed that the stabilizer was trimmed .7 of a degree up which would cause the airplane to nose down [R. 738-739, 741-742, 763].

The investigators admitted that the forward part of the skin forward of the stabilizers and the skin along the sides of the fuselage leading back was smoked. So were the horizontal stabilizers. This portion of the airplane was thrown clear of the area on the ground which burned over [R. 804].

Notwithstanding the foregoing facts, the experts testified that they did not find evidence of mechanical malfunction, although they admitted that they either had not taken into consideration or had discounted the testimony of eye-witnesses. In other words, although the plane was completely demolished, those parts which were found and those systems which were traceable did not reveal to the experts that these systems had failed to function and it was on this negative evidence that the opinion was formed that there was no mechanical failure of the plane.

III.
ARGUMENT.

A. The Facts Support the Verdict.

In this brief the evidence has been referred to in detail in view of its rather cursory treatment in Appellant's Brief and in consideration of the claim of Appellant that there is no evidence to support the verdict. Appellees are aware that unless the contrary is shown, it is presumed that there is evidence to support the verdict and that where the evidence is conflicting, the version which supports the verdict is accepted as established.

From the foregoing statement of facts a conflict appears at almost every point which Appellant's Brief has treated as material to consideration of this appeal. In each such instance it must be assumed that the version favoring the verdict is the true fact.

The fact that foamite was found upon part of the electrical system as the plane neared final assembly, indicating that there had been a fire, is without conflict. That the parts affected by the fire were not replaced or inspected for fire damage subsequent to the fire is indicated by the presence of the foamite and that the only thing required by the inspector was to clean it off.

There is no duty on Appellees to reconstruct the sequence of events by analysis of the evidence. And there is no way to know how the jury viewed the facts. Thinking that a suggestion as to how the jury might have considered the evidence to reach its verdict might be of some assistance, the following is submitted with the understand-

ing that there are other equally acceptable reconstructions of the accident from which the jury could find for the plaintiffs.²

After take-off, the plane was airborne with wheels and flaps up and doors closed over the wheel wells [R. 641]. It was in an attitude of climb, but not climbing very fast [R. 641]. This suggests trouble. A possible and perhaps likely source of the trouble is a broken or leaking fuel line [R. 478]. Since the main power take-off from the engine was too broken to be examined, and the fuel control valve was never recovered, this possibility cannot be precluded [R. 612, 719].

At this point the pilot may have had trouble with the flight control system and recognizing a loss of power, sought to switch to the emergency system [R. 616]. Before this could be accomplished, the leaking fuel may have been ignited by a spark from the defective wiring or otherwise and an explosion with fire following or a flame-out and explosion and fire or any combination of these followed.

The pilot then undoubtedly lost control, probably because of an explosion into the cockpit and possibly because of loss of the electrical or hydraulic system or both, and a crash followed. There is evidence to support each step in this chain.

The evidence is clearly indicative of mechanical failure, which the circumstances indicate is the fault of the

²In *Jaffke v. Dunham* (Jan. 14, 1957), 352 U. S. 285, 1 L. Ed. 2d 314, the Supreme Court of the United States said:

"A successful party in the District Court may sustain its judgment on any ground that finds support in the record."

See also *Petersen v. Riesebeil* (1953), 115 Cal. App. 2d 758, 252 P. 2d 986, which holds that it is to be presumed that the jury reached its verdict on a theory that is supported by the evidence.

manufacturer. Negligence in manufacture and inspection is evidenced by what has already been said of the evidence of a fire in the fuselage during manufacture. There being no evidence that the cause was discovered or rectified or that any effort was made to do so, the possibility of it happening again may be inferred. And such a fire could well be the proximate cause of the accident. Moreover this specific instance of carelessness is indicative of an attitude of indifference from which the jury might well infer a general lack of due care in manufacture and inspection.

Appellees do not rest their case on this possibility alone, but upon all of the circumstantial evidence which clearly points to Appellant's negligence. Appellees further firmly believe that the doctrine of *res ipsa loquitur* is applicable and that the verdict may rest on the jury's application of this legal principle.

It is hard to understand the refusal of the experts to attach real significance to the testimony of eye-witnesses particularly in view of the fact that the accident happened only a second or two after the plane was lost to view in the fog [R. 558, 640]. In only five or ten seconds it would have been above the obscuration [R. 529]. There was hardly time for pilot reaction between when last seen and the loud noise heard by all witnesses. The experts so resolutely turned their backs upon the testimony of what was actually seen to happen that they failed to note how well this testimony was supported by the physical evidence.

A plume of smoke rose 300 feet in the air [R. 558]. This is certain indication of explosion. There were parts of the plane scattered on the runway although the point of impact with the earth was as far away as 325 feet from some of them and despite the tendency of such parts to

travel in the same direction as the airplane. The supposition of Appellant that the wing tanks exploded on contact with the ground is not supported by the physical evidence. These tanks carry fuel of an explosive force equal to 70 to 75 sticks of TNT [R. 772] and yet no crater is evident where the tanks struck the earth and for a short distance gouged out a shallow path of their own width. Some fuel was found in one of them after the accident [R. 714, 715]. They are to be seen substantially intact upon the ground in the photographs, Exhibits G-2, G-6, G-7.

It seems most likely that the wing tanks simply cracked open on contact and that their spilling contents were ignited. They were seen intact upon the airplane as it bounced across the highway [R. 189]. And the section of the plane thrown clear of the ground fire showed signs of fire on its wings and tail section [R. 804]. The attitude of the plane shows that it crashed nose down which would indicate loss of control. A large part of the observable physical evidence points to mechanical trouble in the air. The jury was well supported by substantial evidence of all types in a conclusion that mechanical failure caused the accident—flame-out, explosion or fire, or all three.

“It is no answer to say that the jury’s verdict involved speculation and conjecture.” (that accident was impossible and must have been murder). “Whenever facts are in dispute or the evidence is such that fairminded men may draw different inferences, *a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inferences.* Only when there is a complete absence of probative fact to support the conclusion reached does a reviewable error appear. But

when, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard as disbelief whatever facts are inconsistent with its conclusion, and the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." (Emphasis added.)

Lavender v. Kurn (1945), 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916, 923.

B. There Was No Evidence of Possible Pilot Error.

To argue that the accident was caused by pilot error is a weak effort which finds no support in the evidence.

If the jury concluded that the crash was caused by an explosion or fire in the air, as it very probably did do, then the condition of the weather, the pilot's experience, the stabilizer trim and all of the other little items upon which there was such voluminous and conflicting testimony are entirely immaterial. Since the jury could have so decided, on appeal it must be assumed that the jury did so decide.

In fact the Appellees' case insofar as it relates to evidence of mechanical failure can well rest right there. But Appellant has listed supposed possibilities of pilot error. They are characterized as non-negligent because in the circumstances there is no evidence of pilot negligence. Moreover, there is a presumption with the weight of affirmative evidence against negligence of the pilot and evidence to the contrary merely raises a question of fact which has been adversely resolved against Appellant. Just to clear the atmosphere on this subject, the contentions of Appellant commencing at page 18 of its brief are treated seriatim.

(a) A pilot induced throttle burst is absolutely precluded because this never happens on take-off [R. 471-472].

(b) The testimony is overwhelmingly to the effect that the pilot could not accidentally cut the fuel supply and that to do so intentionally would be suicide [R. 474, 476, 478]. No such speculation can be indulged because of the presumption that the pilot acted with due respect for his own safety (C. C. P. 1961).

(c) The hypothesis that the pilot might "hit" the stick and move it in the wrong direction is preposterous. His life depends upon his hold on the stick and his experience was such as to eliminate any danger of a deliberate turn toward the ground. He was last seen with flaps and wheels up in proper attitude of climb [R. 564].

(d) Nothing more need be said about the experience of this pilot. Reference is respectfully made to Point II C-1 of this brief. There is no reason to suppose that the pilot took off on visual flight and switched to instruments, nor is it established beyond a jury question of fact that he lost visual contact with the ground at any point. At the same time it is equally consistent with the evidence to suppose that he was on instruments from start to finish and that his instruments were warmed up and perfectly functioning.

(e) As pointed out in Point II C-3 the idea that the uncontradicted evidence establishes that the plane or the instruments were not properly warmed up is a mistaken notion.

(f) The evidence of the actuator setting is the theoretical result of laboratory paperwork and there is no testimony to the effect that the angle of impact compares

with the supposed setting. No such comparison was attempted.

(g) The only bad thing about the weather was a fog bank at the far end of the runway and the pilot was airborne long before he reached the fog. The jet engine does not need a warm-up.

(h) There is no evidence that the pilot attempted to fly on visual contact or on instruments or of any switch from one to another. His clearance authorized either at his own election. Kinkella did not know or testify as to what this pilot did.

(i) The throttle is not a delicate instrument [R. 520] nor can it be accidentally cut [R. 476].

C. The Facts Most Favorable to the Verdict Must Be Deemed True and Only Those Inferences in Favor of the Verdict May Be Drawn.

The finding of the jury upon a question of fact is conclusive on appeal. Even the Supreme Court of the United States cannot disturb such a finding.

Cunningham v. Springer (1907), 204 U. S. 647, 51 L. Ed. 662;

First Unitarian Society of Chicago v. Faulkner (1875), 91 U. S. 415, 23 L. Ed. 283;

Nudd v. Burrows (1875), 91 U. S. 426, 23 L. Ed. 286.

Appellant's counsel states flatly that there is absolutely no evidence to support the jury's finding of negligence. There is no other hope of overturning the verdict. The magnitude of the burden with which Appellant is faced is underlined by the authority upon which Appellant relies at page 24 of its brief, *Jacobson v. Northwestern Pacific Railroad* (1917), 175 Cal. 468, 473. In that case the

court pointed out that the jury will be reversed only where the evidence is undisputed and capable of supporting but one inference or is conclusively contrary to the verdict. Such a case is not now before the court. Only a cursory examination of the record indicates that the evidence is conflicting and capable of more than one inference. When different inferences reasonably can be drawn from the evidence, the reviewing court is without power to substitute its deductions for those of the trial court. *Owens v. White Memorial Hospital* (1956), 138 Cal. App. 2d 634, 638, 292 P. 2d 288.

Upon a claim of insufficiency of the evidence the burden rests upon the Appellant to demonstrate that there is no substantial evidence to support the challenged findings. *Nichols v. Mitchell* (1948), 32 Cal. 2d 598, 600, 197 P. 2d 550. The power of an appellate court begins and ends with a determination of whether there is any substantial evidence, direct or indirect, contradicted or uncontradicted, to support the inferences adopted by the trial judge or jury. *Estate of Moore* (1956), 143 Cal. App. 2d 64, 67-68, 300 P. 2d 110.

Appellate review starts with a presumption that there is evidence in the record which sustains every finding of fact. *Tesseyman v. Fisher* (1952), 113 Cal. App. 2d 404, 407, 248 P. 2d 471. All of the evidence most favorable to the respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity to be accepted by the trier of fact. If the evidence so viewed is sufficient, as a matter of law the judgment must be affirmed. *Estate of Teel* (1944), 25 Cal. 2d 520, 527, 154 P. 2d 384.

D. The Trial Judge Did Not Lend Support to Appellant's Contention That There Was No Evidence to Support the Verdict, but Hued to the Line Established by Appellate Authority.

Every opportunity was given to the trial judge to rule that there was no evidence which could support a verdict based upon negligence. Although viewing the case as one not calling for application of *res ipsa loquitur*, he refused to grant the following motions: for nonsuit, for an instructed verdict for defendant, for judgment notwithstanding the verdict and for a new trial. See the interesting discussion of the facts [R. 857-880].

After the motion for a new trial had been argued, the trial judge recognized that the size of the judgment was such as to make an appeal almost inevitable. He even concluded that he probably would not have granted judgment for the plaintiffs. However, he was steadfast in his judgment that there was evidence sufficient to go to the jury. He then told counsel that he was not going to shift the burden of appeal by upsetting the jury's verdict. He observed that the case was fairly tried before a good jury and then said:

"I think I will place the burden of the appeal upon the defendant rather than upon the plaintiff. I don't feel justified in substituting my opinion for the opinion of the jury." [R. 878.]

The trial judge recognized that the burden of appeal should rest where the jury verdict left it, in this case upon the defendant. This was a just decision and it rests upon recognition of the conflicting character of the evidence.

The Supreme Court of the United States said much the same thing in *Tennant v. Peoria and P.U. Ry. Co.*

(1943), 321 U. S. 29, 35, 64 S. Ct. 409, 412, 88 L. Ed. 520:

“It is not the function of a court to search the evidence in order to take the case away from the jury. . . . It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, receives expert instructions, and draws the ultimate conclusions as to the facts. *The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. . . . That conclusion, whether it relates to negligence, causation or any other factual matter cannot be ignored.* Courts are not free to set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.” (Emphasis added.)

The foregoing decision was relied upon by the Court of Appeals for the Ninth Circuit in *Southern Pacific Company v. Heavingham* (C. A. 9th, 1956), 236 F. 2d 406, to uphold the jury’s right to pass upon a very close question of fact. And this same court had previously relied upon the *Tennant* case to reverse the trial court which granted defendant’s motion for judgment notwithstanding the verdict in *Eastman v. Southern Pacific Company* (C. A. 9th, 1956), 233 F. 2d 615, 618, pointing out that the jury could judge the credibility and bias of the witnesses.

For the sake of completeness, we cite authority which supports this point in argument and also Point C above: The rule is best expressed in the words of the court in

Kinkston v. McGrath (C. A. 9th, 1956), 232 F. 2d 495, 497:

“As said in *Wilkerson v. McCarthy*, 1949, 336 U. S. 53, 57, 69 S. Ct. 413, 415, 93 L. Ed. 497, ‘It is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury, we need look only to the evidence and reasonable inference which tend to support the case . . .’”

E. An Inference Reasonably Drawn Constitutes Substantial Evidence.

Where direct and positive evidence of a fact is not available, proof may be made by means of indirect evidence, and the decision of the court may rest on reasonable inferences as well as on direct evidence. Such an inference, reasonably drawn, constitutes substantial evidence.

Williams v. Insurance Commissioner (March 14, 1957), 149 A. C. A. 162, 308 P. 2d 52;

Ignagni v. A. J. Peters & Son (1957), 147 A. C. A. 794;

Majestic Securities Corporation v. Comr. of Internal Revenue (C. C. A. 8, 1941), 120 F. 2d 12;

C. C. P., Secs. 1957, 1958.

F. Circumstantial Evidence Is Sufficient to Support the Jury Verdict.

The point has been made that all of the evidence cannot be reconciled to fit into a single rationalization of the circumstances surrounding the accident. The plaintiff does not have to elect or to establish one inescapable inference (*Singer v. Marx* (1956), 144 Cal. App. 2d 739, 301

P. 2d 440, 444). The opinion in the case of *Katenkamp v. Union Realty Co.* (1940), 36 Cal. App. 2d 602, 617, 98 P. 2d 239, 246, makes a further point:

“It is not necessary, in order to establish a theory by circumstantial evidence, that the facts be such and so related to each other that such theory is the only conclusion that can fairly or reasonably be drawn therefrom, because it is now settled law that ‘circumstantial evidence in civil cases, in order to be sufficient to sustain the verdict, need not rise to that degree of certainty which will exclude every reasonable conclusion other than that arrived at by the jury.’ (Several citations omitted) . . . *Ley v. Bishopp*, 88 Cal. App. 313, 263 P. 369; *Barnham v. Widing*, 210 Cal. 206, 214, 215, 291 P. 173. In the last-cited case, where the judgment was based upon an inference drawn from circumstantial evidence although the inference was opposed to the direct testimony of the defendant and another witness, the Supreme Court upheld the judgment declaring at page 215 of 210 Cal., at page 177 of 291 P.: ‘The jurors were entitled to accept the solution to which these circumstances led them in preference, even, to the positive statements of the defendant and his nurse to the contrary.’ In *Mah See v. North American Acc. Co.*, supra (190 Cal. 421, 213 P. 44, 26 A. L. R. 123), the court declared the rule to be that ‘even though all the facts are admitted or uncontradicted, nevertheless, if it appears that either one of two inferences may fairly and reasonably be deduced from those facts there still remains in the case a question of fact to be determined by the jury * * * the verdict of the jury * * * cannot be set aside by this court on the ground that it is not sustained by the evidence.’”

The late case of *Rodela v. Southern Cal. Edison Co.* (1957), 148 A. C. A. 738 quotes from the *Katenkamp* case with approval and is to the same effect.

In the case at bar there was direct evidence of flame-out, explosion and fire in the air. All of the evidence indicated that a flame-out on take-off was practically unheard of and could only result from fuel starvation [R. 479]. The idea was advanced that this could possibly be pilot induced. The likelihood that the pilot could accidentally cut off the fuel was heavily discounted [R. 478]. It was pointed out that deliberately doing so would be tantamount to suicide [R. 480] so the presumption that the pilot did not do so, but acted with due regard for his own safety (C. C. P. 1963) stands as uncontradicted evidence.

This leaves the remote possibility that the pilot accidentally shut off the fuel. Against this is the obvious possibility of mechanical failure [R. 479] such as a leak or break in a fuel line [R. 612, 719]. An aid in resolving this conflict is the testimony of explosion or fire which no one contends could be pilot induced. Ordinary experience would indicate that leaking fuel would be apt to catch on fire or explode from the heat of the engine or tail pipe or an electrical spark.

There can be no doubt but that the jury had the right and duty to decide whether flame-out occurred, whether it was pilot induced or the result of mechanical failure, whether there was an explosion in the air, whether there was a fire in the air. The jury could determine these questions in any order and when one fact had been established it could aid in resolving the remaining uncertainties.

The only evidence against the inference of mechanical failure was the testimony of experts who examined the wreckage and testified that they found no evidence from the parts which were still whole enough to be examined. This obviously does not preclude mechanical failure. Their opinion to the effect that there was no mechanical failure was open to challenge because their minds were closed to all evidence except their own physical examination of the wreck, because even some of this physical evidence was subject to other interpretation, because of bias and because of general conduct and demeanor—whatever it may have been.

It is to be expected that most of these expert witnesses would be employees of the Appellant, but it was the fact.

“ . . . the jury could disbelieve the testimony of any of the witnesses. ‘The jury was * * * judge of the credibility of these witnesses and of the weight to be given their testimony. The jury could take into consideration in appraising this testimony the fact that they were employees of the appellant railway company and, as such, interested in avoiding the imputation that their negligence caused the death of a fellow employee.’ Chicago & N. W. R. Co. v. Grauel, 8 Cir., 160 F. 2d 880, 826.”

Eastman v. Southern Pacific Company (C. A. 9th, 1956), 233 F. 2d 615, 618.

The implied finding of the jury was that there was mechanical failure.

“There can be no argument that the jury would have been entitled to find that the *center column was in fact defective*, since the accident itself is evidence thereof. *Paxton v. County of Alameda*, 1953, 119 Cal. App. 2d 393, 408, 259 P. 2d 934. There was

ample testimony in the record as well for the jury to arrive at this conclusion.” (*Sullivan v. Shell Oil Company* (C. A. 9th, 1956), 234 F. 2d 733.)

Appellant does not seriously contest the jury's right to so find. Appellant's serious effort to upset the jury verdict is directed at the further implied finding that the mechanical failure was the result of Appellant's negligence.

There is circumstantial evidence of this fact. The presence of foamite on a portion of the electrical system indicates fire. There was no testimony to dispute the natural conclusion that a fire in the course of construction is inconsistent with careful and proper construction methods. There was no evidence to rebut the general experience of man that fire is destructive to electrical insulation. The very presence of the foamite indicated that the wiring had not been replaced. The inspection did not go beyond a direction to clean off the foamite. This may have been taken by the jury as indicative not alone of carelessness in the manufacture of this very plane, but also of an attitude of indifference at the time of inspection.

In support of the same conclusion is the fact that the final inspector was unable to read some of the writing on the inspection sheet as to the complaint or as to its correction. The writing was not his own; so there was no reason to expect that he could have read it easier at the time of inspection, yet he passed the items [R. 816]. The crew chief Rinaldi undoubtedly made a poor impression. He was charged with the duty of making the final corrections and in getting it ready for flight [R. 392]. His memory as to what he did was poor enough to cast doubt upon whether he did what was required.

From this testimony the Appellant intended the jury to infer that great care had been taken in the course of both manufacture and inspection of the aircraft. There can be little doubt from what has been said that the opposite inference is equally tenable. When coupled with the fact that the unusual accident occurred due to mechanical failure, as the jury no doubt concluded, and the fact that the full responsibility for the mechanical condition of the airplane was squarely upon the shoulders of Appellant, the question of whether Appellant's negligence was responsible for the accident was a question of fact.

A question of fact arising either from conflicting positive testimony or from conflicting inference is a question of fact for the jury. (*Spolter v. Four-Wheel Brake Service Co.* (1950), 99 Cal. App. 2d 690, 222 P. 2d 307, 310.) The court in the last cited case points out that if the evidence contrary to the existence of the fact sought to be established is clear, positive, uncontradicted, and of such a nature that it cannot rationally be disbelieved, the court must instruct the jury that the fact has been established as a matter of law; otherwise, it is a question of fact for the jury to decide.

In the case at bar, the trial court properly left the decision to the jury for the reasons outlined in the following quotation from the *Spolter v. Four-Wheel Brake Service Co.* case at 222 P. 2d 312:

“Appellant contends that the inference was rebutted as a matter of law. Such contention is not sound. The trier of the facts is the exclusive judge of the credibility of witnesses. Sec. 1847, Code Civ. Proc. While this same section declares that a witness is presumed to speak the truth, it also declares that “This presumption, however, may be repelled by the manner in which he testifies, by the character

of his testimony * * * or his motives, or by contradictory evidence.” In addition, in passing on credibility, the trier of the facts is entitled to take into consideration the interest of the witness in the result of the case. See cases collected 27 Cal. Jr. 180, Sec. 154. Provided the trier of the facts does not act arbitrarily, he may reject in toto the testimony of a witness, even though the witness is uncontradicted. . . .’”

and further in the same decision on page 313 of 222 Pac. 2d, the court quotes with approval from another case:

“. . . ‘In most cases, therefore, the jury is free to disbelieve the evidence as to the nonexistence of the fact and to find that it does exist on the basis of the inference.’”

The rule of decision in civil cases is a rule of probabilities only and the choice as to which version of the facts is most probable is exclusively within the province of the jury. (*Singer v. Marx* (1956), 144 A. C. A. 739, 301 P. 2d 440, 444.) The latest California case on the subject of circumstantial evidence is the case of *Ignagni v. A. V. Peters & Son* (1957), 147 A. C. A. 794, which supports the points made in the foregoing discussion.

G. The Doctrine of Res Ipsa Loquitur Is Applicable.

The law of California governs the application of the doctrine of *res ipsa loquitur* which is substantive law.

Woodworkers Tool Works v. Byrne (1951), 191 F. 2d 667;

Lackman v. P. A. Greyhound Lines (1947), 160 F. 2d 496;

Smith v. P. A. Central Airlines Corp. (1948), 76 Fed. Supp. 941.

The doctrine is recognized in most States of the Union but each State has its own version. A decision in one State is therefore not necessarily authority in another. In some States it is held to be a question of law as to whether the circumstances do or do not warrant application of the doctrine. This is not the law of California.

The law of this State is well expressed in *Sloboden v. Times Oil Co.* (1956), 145 A. C. A. 243, 302 P. 2d 34.

“Res ipsa loquitur is based in great degree on probabilities; it is a simple, understandable rule of circumstantial evidence with sound background of common sense and human experiences rather than rigid legal formula designed largely for exclusionary purposes.”

1. It Is for the Jury to Determine Whether Each of the Conditions Necessary to Bring Into Play the Doctrine of Res Ipsa Loquitur Is Present.

As stated by the California Supreme Court in the recent case of *Seneris v. Haas* (1955), 45 Cal. 2d 811, 291 P. 2d 915,

“ . . . The existence of the conditions upon which the operation of the doctrine is to be predicated is a question of fact and the right of the jury to find those facts must be carefully preserved. (citing cases.)”

The doctrine is applicable if it can be said that in the light of common experience or from evidence in the case, the accident was more probably than not the result of defendant's negligence. (*Zents v. Coca-Cola Bottling Co.* (1952), 39 Cal. 2d 436, 247 P. 2d 344.) However:

“ . . . The conclusion that negligence is the most likely explanation of the accident, or injury, is not for the trial court to draw, or to refuse to draw

so long as plaintiff has produced sufficient evidence to permit the jury to draw the inference of negligence even though the court itself would not draw that inference; the court must still leave the question to the jury where reasonable men may differ as to the balance of probabilities.

“In order that a plaintiff be entitled to the benefit of the doctrine of *res ipsa loquitur*, he need not exclude every other possibility that the injury was caused other than by defendant’s negligence.” (Prosser, *Res Ipsa Loquitur in California*, 37 Cal. L. Rev. 183, 194-198.)

In *Bauer v. Otis* (1955), 133 Cal. App. 2d 439, 443, 284 P. 2d 133, the court pointed out:

“The inference of negligence is not required to be an exclusive or compelling one. It is enough that the court cannot say that reasonable men could not draw it.”

2. The Doctrine of Res Ipsa Loquitur May Be Relied Upon to Support a Judgment Although No Jury Instruction Is Given.

Jaffke v. Dunham (1957), 352 U. S. 285, 1 L. Ed. 2d 314;

Rogers v. Los Angeles Transit Lines (1955), 45 Cal. 2d 414, 289 P. 2d 226;

Rose v. Melody Lane (1952), 39 Cal. 2d 481, 247 P. 2d 335.

3. The Accident Was of a Kind Which Does Not Occur in the Absence of Someone’s Negligence.

The F86 jet plane delivered to Lt. Hughes was not an experimental model [R. 460, 479]. This particular type of plane had been manufactured by Appellant for four

years [R. 460]. Thousands had been delivered to the Army [R. 330]. A jet plane is no more dangerous than a prop plane [R. 325-326].

It is an extraordinary event for a jet to have a flame-out, to explode or to burn upon take-off [R. 328, 469-470, 479, 626, 627].

Test pilot Annis had flown three to four thousand flights in F86's without experiencing flame-out on take-off or fire or explosion [R. 479]. He had never heard of a plane exploding during take-off [R. 469-470].

The case of *La Porte v. Houston* (1948), 33 Cal. 2d 167, 199 P. 2d 665, is distinguished from the instant case by the fact that there was nothing that the defendant *could* have done to cause the accident.

In the case of *Morrison v. LeTourneau Co. of Georgia* (1943), 138 F. 2d 339, the Fifth Circuit, applying the law of Georgia, refused to apply the doctrine of *res ipsa loquitur* to an airline accident involving the crash-death of a pilot and his passenger. This case is contrary to the doctrine of *res ipsa loquitur* as applied in the State of California and the Ninth Circuit.

Parker v. Granger (1935), 4 Cal. 2d 668, 52 P. 2d 226:

Smith v. O'Donnell (1932), 215 Cal. 714, 12 P. 2d 933;

Boise Payette Lumber Co. v. Larsen (1954), 214 F. 2d 373 (Sustained jury verdict for plaintiff without any actual evidence of negligence and without reference to the doctrine);

Smith v. Alaska Airways (C. C. A. 9th, 1937), 89 F. 2d 253.

In the case of *Williams v. United States* (1955), 218 F. 2d 473, the Fifth Circuit said that under the law of Florida the doctrine was only applicable to cases involving circumstances which are within the common ordinary experience of most people. The case serves to exemplify that the law of Florida differs from the law of California, but it is of no further significance.

The difference between the law of California and the law of Wyoming appears in *Cohn v. United Air Lines Trans. Co.* (1937), 17 Fed. Supp. 865, wherein the District Court states:

“ . . . the law tells us that the doctrine of *res ipsa loquitur* shall not be applied if there is any other reasonable or probable cause from which it might be inferred that there was no negligence at all.”

4. The Condition Requiring Exclusive Control in Defendant Is Satisfied.

The requirement of control is not an absolute one. The fact that the accident occurred sometime after defendant relinquished physical control of the instrumentality which caused the accident does not preclude application of the doctrine provided there is evidence that the instrumentality had not been improperly handled by plaintiff's decedent or some third person or its condition otherwise changed after control was relinquished by defendant.

Zentz v. Coca-Cola Bottling Co., supra;

Nungary v. Pleasant Valley etc. Assn. (1956), 142 Cal. App. 2d 653, 300 P. 2d 285;

Burr v. Sherwin-Williams Co. (1954), 42 Cal. 2d 682, 268 P. 2d 1041.

It is the control of the instrumentality by defendant at the time of the negligent act which satisfies the control element.

Rohar v. Osborne (1955), 133 Cal. App. 2d 345, 284 P. 2d 125;

Fields v. Oakland (1955), 137 Cal. App. 2d 602, 291 P. 2d 145;

Baker v. Goodrich Co. (1953), 115 Cal. App. 2d 221, 252 P. 2d 24;

Hoffing v. Coca-Cola Bottling Co. (1948), 87 Cal. App. 2d 371, 197 P. 2d 56;

Escola v. Coca-Cola Bottling Co. (1944), 24 Cal. 2d 453, 150 P. 2d 436;

Liggett and Myers Tobacco Co. v. De Lape (C. C. A. 9th, 1940), 109 F. 2d 598;

Michener v. Hutton (1928), 203 Cal. 604, 265 Pac. 238.

The evidence in this case is clear and without contradiction that the Appellant had full physical control over the jet plane until the moment when Lt. Hughes climbed into the cockpit (Point II C 4 of this brief). He had physical control of the instrumentality only for a few minutes before the accident. After Lt. Hughes climbed into the cockpit and until the moment when the aircraft entered the obscuration at the far end of the airstrip there was no change in the condition of the aircraft.

There is no evidence that Appellees' decedent improperly handled the instrumentality. There is a presumption which is evidence in the case that he exercised all due care. (C. C. P. Sec. 1963.) As pointed out in this brief (Point II B) non-negligent pilot error could not have caused the disaster.

Appellant cites the case of *Parker v. Granger* (1935), 4 Cal. 2d 668, 52 P. 2d 226 as holding that Appellees are precluded from the use of the doctrine of *res ipsa loquitur* because of the lack of exclusive control in Appellant.

However, in that case the Supreme Court held that *it was for the jury to determine for itself whether the doctrine of res ipsa loquitur applies* and that the jury could find that in this particular factual situation that the doctrine was not applicable.

The other cases cited in Appellant's Opening Brief, page 32, are either in favor of Appellees' position or not in point. (*Michener v. Hutton* (1928), 203 Cal. 604, 609, 265 P. 2d 238. "The maxim may be applied even when the thing causing injury was not in the immediate custody or management of the defendant or his servants."; *Olson v. Whithorne* (1928), 203 Cal. 206, 263 Pac. 518, plaintiff was properly found guilty of contributory negligence; *La Porte v. Houston* (1948), 33 Cal. 2d 167, 169, 199 P. 2d 665, "assuming that defendants were in control of the car"—there was no probability in favor of defendants' negligence.)

5. The Accident Could Not Have Been Due to Any Voluntary Action or Contribution on the Part of Appellees' Decedent.

Appellees agree that an element of the doctrine of *res ipsa loquitur* is lack of contribution. However, contribution is a question of fact to be resolved by the jury. (*Seneris v. Haas* (*supra*), p. 823. "We are of the opinion that the jury, under appropriate instructions, should have been permitted to determine whether each of the conditions necessary to bring into play the rule of *res ipsa loquitur* were present.")

The case at bar is not governed by the case of *Spencer v. Beatty Saffway Scaffold Co.* (1956), 141 Cal. App. 2d 875, 297 P. 2d 746. The distinctions are apparent when a paragraph omitted by Appellant in Appellant's Opening Brief, Appendix E is inserted:

"As proof that negligence of respondents did not cause appellant to fall, it is recalled that he had for eight months been familiar with the method of operating the bleacher, and had been the chief actor in its operation. He had never discovered anything out of order. On the contrary, *he had abused the ply-board by standing on the lid which was not designed to support a man's weight.* Such practice may have caused a warping of the plyboard and thus have added to the friction of the cable and caused it to be immobilized." (P. 882.)

The record together with the disputable presumption of due care which Appellant does not contend was rebutted permits "a reasonable inference that it (the aircraft) was not accessible to extraneous harmful forces and that it was carefully handled by plaintiff. . . ." (*Escola v. Coca-Cola Bottling Co.* (1944), 24 Cal. 2d 453, 458, 150 P. 2d 436.)

Appellant misconceives the attitude of Appellees with respect to the presumption of due care which applies to decedent's conduct. It is a simple fact that there is no evidence in the record to indicate that decedent contributed to the cause of the accident. Each of the matters referred to by Appellant on pages 35 and 36 of its brief have been fully discussed heretofore in this brief under appropriate headings.

Generally speaking the attempt of Appellant to point to contributing causes to the accident has resulted in the rankest speculations and improbable suppositions. Ap-

pellees simply claim that the California law requires the question of contribution to be submitted to the jury in the same manner as any other question of fact.

Appellant argues on page 34 of its brief that any possible negligence which might be inferable to Appellant has been dispelled as a matter of law by the clear and uncontradicted evidence of Appellant that there was no defect in this plane. The most direct answer to this naive argument is to be found in *Sullivan v. Shell Oil Company* (C. A. 9th, 1956), 234 F. 2d 733, 738, wherein the court points out that the accident itself is evidence of the defect.

Appellant relies upon *Leonard v. Watsonville Community Hospital* (1956), 47 A. C. 516, which case held that the uncontradicted testimony of witnesses who were in effect testifying against their own interests was legally beyond doubt, but at the same time held that similar testimony by another witness who stood to benefit thereby was open to question as self-serving and biased. In the case at bar Appellant stands in the shoes of the latter not the former and is subject to the jury's judgment.

Conclusion.

If the case was one which should have been submitted to the jury as Appellees contend, the court did not err in failing to grant Appellant's motion for judgment notwithstanding the verdict. For all of the reasons hereinabove set forth, the judgment on the verdict of the jury should be affirmed.

Respectfully submitted,

JAMES V. BREWER and
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By ALBERT LEE STEPHENS, JR.,
Attorneys for Appellees.





APPENDIX A.

1. Witnesses Located at the East End of Runway.

The take-off run for the fatal flight commenced at the East end of the runway and ended with the crash beyond the West end.

Three witnesses were at the East end of the airport South of the runway at the time of the accident. Richard B. Gottschalk had been an employee of North American Aviation, Inc., for 12 years. He heard the aircraft start its run and thought nothing more about it until the crash signal sounded, at which time he looked toward the West and saw a head of smoke over the top of the fog at the West end of the runway, which was approximately 5,000 feet, or almost a mile, West of where he was. He went directly to the scene of the crash and arrived behind what was probably the third piece of equipment arriving [R. 286]. He testified that the fog was low to the ground [R. 285]; that it was sort of spotty, rolling in and out of places [R. 304].

Rinaldi, the crew chief, and Beaudry, the security officer, were both approximately 400 yards West of the East end of the runway. Rinaldi testified that the fog was West of the West end of the runway [R. 423]. Beaudry said that the fog was between Hangars 7 and 8 because he could not see Hangars 8 and 9 because of the fog [R. 576]. It should be borne in mind that these witnesses were more than half a mile from Hangar 8.

2. Witnesses Located Near the Point of Take-off From the Ground.

Witness Kunzler, an employee of Appellant, was a flight line mechanic on duty at the time of the accident in a crash truck. He was sitting outside the blast wall in

front of Hangar 8. He testified that he was 500 feet South of the runway and 2,000 feet East of the East end [R. 554, 555]. He said that the fog had reached a point a trifle West of Hangar 9 and that it was like a wall of fog that came in at the end of the runway [R. 557]. He could not see the aircraft after it entered the fog bank. The fog extended from 300 feet above the ground [R. 559] to the ground [R. 564].

3. Witnesses Located Southeast of the Point of the Crash.

Two witnesses testified that they were Southeast of the scene of the crash. Mr. Patrick H. Rogers was a flight test inspector at Northrup. He had been in this type of business for about 24 years. At the time of the accident he was on the Northrup ramp leading to the taxiway which was approximately 350 feet East of the West end of the runway and roughly 500 feet South. The fog was all around him. He testified that he saw the plane airborne 25 to 40 feet above the ground before it had reached the end of the runway when there was a loud explosion and a big burst of flame and that he could see nothing more because of the fog [R. 180]. He said that as far as flight conditions were concerned, it was zero at the West end of the runway. He said there was about a 300-foot fog bank rolling in [R. 181]. He could see the outline of the plane in the fog [R. 181]. He thought that the fog ran clear down to Sepulveda [R. 181-182]. Mr. William Pitts, who is a civilian employee for the Air Force testified that he was between Hangars 8 and 9 approximately 1,400 feet East of the West end of the runway and 900 feet South [R. 638]. He saw the plane disappear into the fog at a position of approximately 250 feet Westerly of Hangar 9 [R. 643-644].

4. Witnesses Directly South of the Scene of the Crash.

Three witnesses were going North on Lincoln Boulevard which is located 350 feet West of the end of the flight strip. Appellant's test pilot Kinkella was the closest to the scene of the accident. He had to slam on his brakes to keep from getting into the fire which spread from the plane as it shot across the road. He testified that visibility was about 30 yards at that time and that the fog extended to the ground and Easterly to approximately Hangar 9 and that it was not spotty [R. 535, 551]. Witness Walter Spencer, an aircraft inspector for Douglas Aircraft, who had been 15 years in the business, was driving his car in the direction of the scene of the crash and was 250 to 300 feet South of the place where the plane crossed the road [R. 191]. He saw the plane 30 feet East of the fence on Lincoln Boulevard. He said:

"A. I didn't think it was too foggy. It wasn't good visibility, but I don't think it was too foggy. I could see pretty well.

Q. When you were 250 to 300 feet from this plane, could you see it plainly? A. I noticed it as it crashed, yes sir." [R. 194.]

He testified that he saw smoke before the plane hit the ground [R. 195].

Witness Robert E. Callagy, an inspector for Douglas Aircraft, associated with the aircraft industry for 20 years, testified that he was traveling toward the scene of the crash 150 to 200 yards South of it [R. 185]. He saw the plane half-way between the end of the runway and the fence, at which time it was airborne and on fire, with flame coming out of both sides of the wing back to

the tail section [R. 186]. He stated that there were blotches of fog and then it would be clear; that it was quite foggy, but that you could see [R. 188].

5. The Character of the Fog.

Above 300 feet the visibility was unobscured [R. 438]. The record shows that fog was coming in on the West end of the runway as above described and it would appear from some of the testimony that this fog extended upward to more than 100 feet because the airplane was seen to disappear into the fog at that altitude [R. 641]. The fog was also said to be close to the ground [R. 285], and see testimony of Edward Kunzler indicating that the fog extended as high up as 300 feet [R. 559] and to the same effect, the testimony of Patrick Rogers [R. 181]. Even if the fog extended 300 feet in the air, at a gradual rate of climb a plane would travel from 100 feet altitude through the fog and be on top in a matter of a few moments [R. 516, 529].

The jury could have concluded that the patchy condition of the fog was such as not to interfere materially with visual reference to the ground or that the time required for passage through it to get on top was so brief [5 to 10 seconds; R. 529] that instruments could not have assisted the pilot, in which event the fog could not have been a contributing factor to the accident, which is to say that the condition of the weather and the pilot's qualifications for instrument flight were immaterial and of no consequence whatever. Or from the other facts, the jury might have concluded that the accident happened so soon after entry into the fog area that the possibility of crash as a result of lack of orientation of the pilot is precluded or even that the area of the crash was so

close to the point of entry into the fog that lack of orientation of the pilot could hardly reasonably explain the accident.

6. Evidence Concerning Flight Clearance and Take-off Instructions.

Decedent was cleared for instrument flight. Instrument clearance is required if at destination or any point along the way instruments are expected to be necessary [R. 172]. There was no evidence of the weather condition at destination or enroute. The Chief Controller at the control tower did not testify that decedent was instructed or ordered to use instruments in take-off. He testified that the Air Route Traffic Control, a Government agency, controls the flight of aircraft between terminals and that this agency leaves the flight of aircraft within the immediate area of the Los Angeles International Airport to the control tower [R. 169, 170]. The Government agency's instructions governing the flight between terminals was Exhibit 3. This did not purport to instruct as to how decedent was to leave the Los Angeles Airport.

The control tower issued its own instructions, Exhibit 3A. Interpreting these latter instructions, the Chief Controller said "instructions were issued to him to climb westbound to on top of the haze or condition, whatever it was at the time" [R. 171]. This did not indicate that the pilot could *not* take off using visual reference [R. 172]. It indicated that "*apparently* there was weather or he *probably* would not have been issued a climb instruction" [R. 173, emphasis added]. This question and answer followed this explanation:

"The Court: Whether (sic) that indicated he had to use instruments in the take-off?

The Witness: That's right." [R. 173.]

This was a deduction made by the witness [R. 172] from the record before him that the condition of the weather was such as to require instruments. This witness had no recollection of the actual facts [R. 174]. There was no testimony that conditions were such that all flights were required to use instruments in take-off.

Mr. Lemmer, who was the Chief Controller, was not present at the time of the accident [R. 174]. Mr. Fischer was the Acting Chief Controller as is indicated on Exhibit 2, or, as he described himself, was Supervisor of the Watch and present in the tower at the time of the accident and was produced as a witness for defendant. He was not asked directly whether the weather was such that clearances were only being granted on instruments. Despite his positive answers to questions by counsel for defendant that the flight in question was an instrument take-off [R. 434] and that the reason for the instrument flight clearance was the reduced visibility [R. 445], his testimony taken as a whole indicates that the Military controls all military flights and issues instrument clearances where appropriate [R. 434-446].

There is nothing to indicate that these clearances do not depend upon weather in route or at destination and that the flight clearance given by the tower corresponds with the Military clearance. He pointed out that the tower does not control military aircraft departures [R. 438] except to release them into the traffic in a manner consistent with safety [R. 443]. He also testified that the airport handled about one thousand planes a day and that he did not consider the conditions dangerous for take-off at the time of the accident and that the existing conditions were "fairly common, fairly normal" [R. 442]. As far as he was concerned, "there was absolutely nothing

abnormal in this first preparation for flight or in the flight or the take-off" [R. 444]. The majority of pilots are visual flight rule pilots [R. 445]. All of this would indicate that he drew his own conclusions about the reason for the Military Flight Clearance and that weather conditions at the airport were not such as to require him to refuse clearance except on instrument flight rules or the traffic would have been greatly reduced.

Test pilot, Frank Smith, testified that in his opinion the condition of the weather was such as to require instruments [R. 513].

Whether it was "instrument weather" or not seems to be a question for the jury and not an "uncontradicted" fact either way.

Appellant's brief is most misleading by choice of expression at page 4 where it is said that when the airplane became air borne, "the weather was so bad that it could not be seen from the control tower." The plane became air borne at about Sepulveda Boulevard [R. 556] which is more than one mile from the tower. The references given to support this statement are entirely foreign to the subject matter. The record at 519, 523 and 524 refers to the testimony of Frank Smith, a test pilot who was at the Flight Office at North American Aviation from whence he observed the plane go down the runway a distance of 2500 to 3000 feet. It was still on the cement when he last saw it as it passed the range of visibility in the obscuration [R. 524]. The record at 640 is the testimony of Mr. Pitts who was near hangars 8 and 9 and saw the plane leave the ground.



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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NORTH AMERICAN AVIATION, INC., a corporation,
Appellant,

vs.

WANDA LEE HUGHES and RANDALL L. HUGHES, a Minor,
by his Guardian *ad Litem*, HARRY SUTTON,
Appellees.

APPELLANT'S REPLY BRIEF.

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Appellees.

APPELLANT'S REPLY BRIEF.

Preliminary Observations.

An examination of appellees' reply brief has disclosed inaccuracies which are so palpable that appellant must herewith set forth in great detail certain evidence in order that the inaccuracies may be readily discerned and that no injustice shall prevail by reason of these statements.

The importance of the material that follows stems from the fact that there could have been only *two* causes for the crash of the plane; first, some failure in the performance of some part of the plane, and second, some act or contribution on the part of the pilot [R. 600-601]. That the trial court was fully conscious of the latter is indicated throughout the transcript. See page 309, where the court overruled objections with reference to whether or not any of the 18 flights scheduled for December 18, 1953, were permitted to leave the ground in view of the weather con-

ditions. Further indication of the trial court's concept of the probability of pilot error is found in the fact that the trial court *at all times* refused to apply the doctrine of *res ipsa loquitur*, undoubtedly concluding that in the face of a mass of evidence indicating probable pilot error, that under the well settled cases of *Zents v. Coca-Cola Bottling Co.*, 39 Cal. 2d 436; *Ybarra v. Spangard*, 25 Cal. 2d 486, and others one of the major requirements for the application of the doctrine, to wit, that there be no voluntary act or contribution on the part of Lt. Hughes, had not been fulfilled.

I.

Inaccuracies Reflected in Appellees' Brief.

Space would not permit a detailing of all of the inaccuracies in the appellees' brief. The major ones will be called to the court's attention.

1. "Lt. Hughes Was an Experienced Pilot." (R. B. 4.)

This impression is *vital* to appellees' position since if it appears that the accident may have been due to some act or contribution on the part of the decedent, then *res ipsa loquitur* will not apply. (*Zents v. Coca-Cola Bottling Co.*, 39 Cal. 2d 436.)

Thus appellees state at page 5 of their brief:

"First Lieutenant Hughes had 137 hours of *instrument time prior to December 18, 1953* [R. 153]."

Actually the transcript reference cited by appellees in support of their assertion that Hughes had 137 hours of *instrument* time reads as follows [p. 153]:

"Q. By Mr. Brill: On any of the subsequent sheets on the flight record from May 1953 to December 1953, do you find any reference to the instrument rating? A. Yes. On sheet No. 15, dated

June 1953, Air Force Regulation 60-2 and Air Force Regulation 60-4 requirements waived due to pilot service in F.E.A.F.

It shows total *time* 137 hours, *instrument time* 9 hours and 20 minutes, night flying time 3 hours and 10 minutes, indicating his card had been extended."

IT WILL BE CLEARLY OBSERVED THAT APPELLEES' CONTENTION THAT LT. HUGHES HAD 137 HOURS OF INSTRUMENT TIME (A. B. p. 5 and top of p. 6) IS GROSSLY ERRONEOUS. OBVIOUSLY COUNSEL FAILED TO OBSERVE THE COMMA PRECEDING THE WORDS "INSTRUMENT TIME."

Lt. Hughes was in *no* particular an experienced *instrument pilot*, as appellees wish this court to believe. He was married in 1950 at San Angelo, Texas, where he was *starting* his basic training [R. 103]. He went overseas in 1952 and stayed 10 months [R. 109], returning to Nellis Air Base, where he remained for almost six months until his death in December of 1953. His training apparently commenced in April of 1951 [R. 116] when he was in a "prepping" organization known as the A.T.R.C. [R. 116]. *He was not rated* [R. 117], *i. e.*, not commissioned. "He was *first set up* for training as a pilot" March 22, 1952 [R. 117]. In other words, Lt. Hughes at the time of his death in December of 1953 had been rated a pilot for *less than one year and nine months*. Appellant submits that the total actual *instrument* flight time of Lt. Hughes prior to his death instead of being 137 hours was not over "*9 hours and 45 minutes*, exclusive of hood time and Link trainer time."

At the time he was commissioned in March of 1952, he had a total pilot time (basic training) of 279 hours [R. 117]. There is not a scintilla of evidence that any of this time involved *instrument time*. His remaining flight record is fully set forth in Appendix "A."

In order to maintain a *current white card* it was necessary to have flown instrument time *every month* [R. 152]. He held no instrument certificate for the period August 12, 1953, up to and including the date of his death [R. 154]. The "card was not current. He had not flown the required hours" [R. 155].

He had only had two flights in F86 type aircraft in the *six months period prior to his death*, and [R. 142-145] during that same period had only flown 30 minute instrument time. The balance of this time during the last period was spent in a Lockheed trainer. In the Korean theater he flew only in the F86E, a different *model*, although a jet.

Appellees say at page 5 of the Appellees' Brief:

"First Lieutenant Hughes had 137 hours of instrument time prior to December 18, 1953 [R. 153]. In this respect, according to appellant's witness, he met the qualifications for holding a green card. This is the only material point because appellant's comments on this subject are intended to discredit the experience of decedent in instrument flight."

It will thus be observed that there is no comparison between the experience of the pilots. Annis 10,000 hours (1500 in F 86s); Smith 7500 with 800 hours in F 86s; Kinkella 5000 hours with 800 to 900 in F 86s, all of whom held *green cards*. Appellees' own witness Harrison testified that the requirement for a green card was 500 hours *actual instrument flight*. Irrespective of the requirements for a *green card*, it is obvious that under no view of the evidence was Lt. Hughes qualified for a green card.

2. The Weather.

Appellee asserts that "the weather conditions were *normal* for the Los Angeles International Airport" (App. B, p. 6).

This is contrary to the evidence. The facts disclosed without conflict are simple: The weather was instrument weather [R. 513]; the flight was in instrument flight—planned as such and cleared as such by the authorities [R. 517];

The plaintiffs' own witness Roman Lemmer testified that the official records indicated *some* type of *weather* [R. 169]; it was of such a character that Hughes could not fly contact, *i. e.*, visual, but was required to fly instruments to the top of the condition, whatever it may have been [R. 170-171]. The witness testified that *on the take-off the pilot had to use instruments.* (That is, the pilot with less than 16 hours of actual instrument flight time.) [R. 172-173.]

Patrick Rogers, plaintiff's witness, standing 300 feet south of accident [R. 179], testified, "Well, I would say as far as flight conditions were concerned, it was *zero* on the west end of the runway" [R. 180]. Although he was practically on top of the scene, he heard an explosion and saw a flash of fire, he could *not* see the plane because of the fog. *All I could hear was metal, and you couldn't see it on account of the fog*" [R. 180]. "You could hear it (airplane) going some place, but you couldn't tell where it was going on account of the fog, you couldn't see it" [R. 182].

Plaintiff's witness Robert E. Callagy was driving a car north on Lincoln Boulevard and was 150-200 yards south of where the runway would have crossed Lincoln Boulevard [R. 185]. There were patches of fog [R. 188].

The appellees' statement is extremely misleading; for example, they say, "visibility was officially fixed at one half mile" (B. p. 6). Obviously this was an observation

made some time before the take-off and the accident. The fog condition which was coming in was *undisputed* by all; it was *rapidly moving* and by the time Lt. Hughes reached the end of the air strip, he was *completely enveloped in the fog*. All witnesses will differ slightly in their testimony. These minor conflicts cannot be determinative of the true facts in the light of the undisputed testimony that the flight was in instrument flight, the pilot filed a flight plan indicating an instrument take-off, the weather was classified as instrument weather [R. 434]. Since there was no evidence of any instrument weather enroute, the only conclusion that can be drawn is that the weather described by the various witnesses was responsible for the scheduling of this flight as an instrument flight. Appellees say in the appendix that Fischer, the Acting Chief Controller at the Air Tower, drew his own conclusions about the reason for the military flight clearance and that weather conditions at the airport were not such as to require him to refuse clearance on instrument flight rules, "or the traffic *would have been greatly reduced*" (App. B, Appendix A, p. 7). Clearly this is inaccurate. This man testified that the visibility was so restricted that "we could just barely see the runway where the aircraft departed, due to the visibility restrictions" [R. 440]. He testified that while the condition was not unusual [R. 444], that it was *not normal*. The key to Fischer's testimony which has been so tortured by appellees is found in the following [R. 444-445]:

“Q. Well, now, I don’t know, but did you mean to imply it was perfectly normal to have only a half mile visibility at Los Angeles International Airport?
A. It is not unusual.

Q. It is not unusual, but it is not normal, is it, sir?
A. A visibility condition like that is never normal, no.

Q. Is it also not true, sir, that this was an instrument flight clearance? A. That is correct.

Q. And the reason it was instrument flight clearance was because of the conditions? A. The reduced visibility."

This witness further stated that when there is either high fog or low fog that you take off and land with instruments [R. 445].

There is not one word of testimony from which it could be inferred that at the time Lt. Hughes took off, *anyone*, military or otherwise, *would have been permitted to fly by visual rules or contact rules*.

The testimony of other witnesses who testified as to the condition of the weather is set forth in Appendix "B."

In the face of the evidence set forth in Appendix "B" it is difficult for appellant to understand how the appellees can conscientiously claim that the weather conditions were "normal" for the Los Angeles International Airport. It seems to appellant that the matter is settled without conflict by all witnesses, that the weather on the day in question was instrument weather; that the flight in question was an instrument flight. That there was a rolling bank of fog coming in from the ocean is conceded by every witness who testified. While one witness may have been able to see a few feet farther than the other, the fact remains that *for flying purposes*, the weather was instrument weather. With a plane traveling at a take off speed, in excess of 100 mph, it must be quite evident that the fact that a particular witness was able to see a distance of 50 or even several hundred feet is of no importance, and creates no true conflict on the ultimate issue as to the type of weather which was involved.

3. The Statement That "Neither the Instruments nor the Jet Engine Needed to Be Warmed Up" (R. B. 8) Is Misleading.

The assertion is made in appellants' brief that the jet engine did not require a warm-up. Appellant concedes that it is unnecessary to warm up a jet plane, *i.e.*, the motor as is true with the ordinary gasoline combustion type motor. If a visual flight is contemplated, the plane immediately after the motor is started may take off without further ado. The important factor, however, is glossed over by appellees because it goes to the very heart of their case, with reference to the conduct of the decedent insofar as it may have contributed to the crash.

Where the flight is by instrument, the use of a vertical gyro horizon is indispensable. Appellees suggest that all that is necessary is to turn the switches on for five minutes and that the gyros would come to a speed sufficient to give a proper indication on the instrument. Appellant does not so read the testimony of Witness Annis, who testified as follows:

"Q. Do you, Mr. Annis, make any run up in so far as instruments are concerned? A. In VFR flights, we do not. It requires for proper gyro operation, about five minutes *full power run* to assure yourself that the gyro horizon is operating properly." [R. 455.]

Appellees, would have this court believe that the gyro horizon may have been properly placed in operating order because the switches may have been on for five minutes even though the motor was not running, five minutes before the plane took off. Appellee apparently has overlooked the testimony of G. E. Beaudry, a security officer who was familiar with the decedent and spoke to Lt. Hughes as he proceeded to his ship. He helped decedent buckle

on his parachute [R. 574]. Lt. Hughes then climbed into the cockpit, brought his canopy to the half way mark, started his engine, and after *ten to fifteen* seconds started to taxi down the runway [R. 574]. Obviously this does not indicate any five minute wait, so that the gyro horizon would be permitted to stabilize. However much appellees may gloss over this fact, the undisputed evidence is that Lt. Hughes was *guilty of some degree of fault or contribution*, since he did not in accordance with the uncontradicted evidence, properly stabilize the gyro horizon before taking off on an admitted instrument flight. No matter how appellees present the evidence, there simply is evidence from *no one* which would justify the inference that *5 minutes elapsed between the time Lt. Hughes first got into the plane and the time he actually commenced his take off*. That this instrument must be in proper working order is imperative since it *simulates an artificial horizon so that the pilot can tell where he is going* [R. 518], when he is flying on instruments.

4. **"There Was Evidence of Carelessness in the Process of Manufacturing or of Inspecting the Airplane."**
(R. B. 9.)

Although appellees' entire case was predicated upon the theory of manufacturer's liability there is not one scintilla of evidence to establish any negligence in and about the design or manufacture of the airplane. Even on the motion for a judgment notwithstanding the verdict, appellees' counsel was unable to designate any respect in which the appellant had been negligent in connection with the manufacture of the aircraft [see pp. 870-874].

All appellees have set forth in the reply brief on this point is the suggestion that an inspection of the aircraft prior to delivery showed that at some time in the manufacture of the aircraft, there was a residue of a preparation known as "foamite." From this single notation,

appellees conclude that the mere presence of foamite *might* have been evidence of a fire, which might have affected adversely some portion of the plane, which *might* have failed to pass subsequent inspections. It must be kept in mind that the plane had been test flown on two separate occasions. Obviously there could have been nothing wrong with the electrical system or there would have been some indication of trouble at the time of the original flights. To permit a jury to conclude from this shred of evidence that there was some possible proximate causal connection between the presence of foamite and the ultimate crash of the ship would be to indulge in the rankest type of speculation.

5. **"There Is Evidence That There Was a Flame Out, an Explosion in the Air, a Fire in the Air, and Then a Crash." (R. B. 13.)**

It was the consensus of opinion of all experts that there had been no flame out. No witness testified that there was a flame out despite the statement on page 14 of the reply brief that "Two witnesses testified that there was a flame out."

As appellees point out, there is probably no way that anyone can possibly reconcile all of the versions of the various witnesses with respect to some of the *minute* details of the incidents that took place on December 18, 1953, at the fog-bound airport. Whether these differences are based upon vantage points, upon the personality of the witnesses, upon faulty observations, upon versions that may have been reconstructed in the mind of the particular witnesses after knowing more about the incident, is hard to tell.

The witness Fred Prill, one of the project engineers, testified that, ". . . but I think just about every aircraft accident, somebody figures they saw it explode"

[R. 748]. Appellant does not deny that there was some type of explosion, but the entire concept of an *in the air explosion* is unsupported by the credible evidence. From the gouge marks that were found after the crash, it is obvious that the airplane hit the ground intact, and that any explosion that took place came thereafter. If there had been an in the air explosion, there is no earthly way that the nose of the plane with the two gasoline tanks on the wing tips, could have come down so that there would have been a crash leaving three gouge marks as were left in this case. The highly inflammable fuel carried in the two tanks clearly accounts for the rupture of the tanks and the explosion and fire. None of the experts examining the wreckage were able to find any evidence of an explosion inside the plane. To a lay witness, unable to visualize the plane clearly in the fog, the precise continuity of events might be easily mistaken. At a speed of 125 to 150 m.p.h., it is quite obvious that when the plane hit, it exploded and bounced into the air and then tore across the highway to its final resting place.

It was stipulated by appellees that the airplane became air borne and *crashed immediately* after take-off [R. 101]. If it had exploded in *mid air*, the *airplane* would never have crashed—the pieces would merely have fallen to the ground. Actually because of the fog and the location of the various witnesses, *minor* discrepancies appear. Appellant is of course thoroughly familiar with the rules relating to conflicts in the evidence. Illustrative of the type of conflict involved, however, is the testimony of Rogers at page 180, where in one breath he purports to say he saw the plane, give its altitude, and in the next breath say, "You couldn't see it on account of the fog" [R. 180]. Appellate courts have shown an increasing tendency to become slaves to procedural devices which in effect deprive them of their judicial manhood. In *Martin School of Aviation v. Bank of America*, 146 A. C. A. 390,

the court at page 396 bravely attacked the problem and stated:

“While the jurors are the sole judges of the facts, the question as to whether or not there is substantial evidence in support of the plaintiff’s case is always a question of law for the court . . . and in determining this question the credibility of courts is not to be deemed commensurate with the facility and vehemence with which a witness swears. It is wild conceit that any court of justice is bound by mere swearing. It is swearing creditably that is to conclude the judgment. (*Hall v. Osell*, 102 Cal. App. 2d 849, at 853, 228 Pac. 2d 293.)

“While the findings of the trial court will not be disturbed on appeal if the record discloses substantial evidence to support them, such rule has no pertinency where the evidence without conflict clearly establishes the impropriety of the inferences drawn by the court from the uncontroverted facts. (*Estate of Tarrant*, 38 Cal. 2d 42; *Estate of Teed*, 112 Cal. App. 2d 638.)”

6. The Statement That the Trial Judge Did Not Lend Support to Appellants’ Contention That There Was No Evidence to Support the Verdict Is Fallacious.

Appellees quote from only a small portion of the colloquy between court and counsel at the time of the motion for a new trial.

The trial court was unable to perceive any evidence of negligence on the part of appellant. Even after the verdict, the trial court stated that he did not know on what theory the jury had determined negligence [R. 878]. He stated very frankly that if he had been trying the case he would not have found for the plaintiff [R. 878]. The court then stated:

“In my opinion I think that the plaintiff would have to prove more than an accident happened. *In my opinion I think that is all counsel proved, that an accident happened.* You would never have been able to say that because of this or that, say a crash happened because of this, or maybe because of something else.” [R. 878.]

Despite the court's belief that the record was devoid of anything other than the mere fact that an accident had occurred, he apparently was of the *mistaken belief* that he did not have the right to substitute his opinion for the jury's opinion. He thereupon erroneously placed the burden of appeal upon the defendant rather than upon the plaintiff [R. 878].

II.

The Doctrine of *Res Ipsa Loquitur* Is Not Applicable to This Case.

Numerous cases have been decided throughout the country dealing with aircraft, and it has been uniformly held that the doctrine of *res ipsa loquitur* is not applicable to such cases. The few exceptions to this rule almost invariably involve a suit wherein a passenger or the relatives of a deceased passenger is suing a common carrier, or a suit against an airline or a private owner arising by reason of the wrongful death or personal injury of a person on the ground following the crash of a plane, or damage to property as a result of the crash of a plane. Obviously, in any of the types of cases mentioned, the injured plaintiff was not confronted with that portion of the rule of *res ipsa loquitur* which requires that the accident must not have been due to any voluntary act or contribution on the part of the plaintiff. Such is not the case, however, where the action is brought by the heirs of the deceased pilot who is actually in control of the plane and whose conduct may have caused the crash.

Some of these various cases are the following:

Wilson v. Colonial Air Transport (Mass.), 180 N. E. 212;

Herndon v. Gregory (Ark.), 81 S. W. 2d 244;

Smith v. Whitley (N. C.), 27 S. E. 2d 442;

Boulineaux v. City of Knoxville (Tenn. App.), 99 S. W. 2d 557;

Budgett v. Soo Sky Ways (S. D.), 266 S. W. 2d 53;

Deojay v. Lyford (Me.), 29 A. 2d 11;

Towle v. Phillips (Tenn.), 172 S. W. 2d 806;

Cudney v. Mid-Continent Airline (Mo.), 254 S. W. 2d 662;

Davies Flying Serv. v. United States, 114 Fed. Supp. 776.

Appellees dismiss lightly the decisions referred to by appellants in the opening brief, all involving aircraft, particularly the cases of *Williams v. United States*, 218 F. 2d 473; *Morrison v. LeTourneau*, 138 F. 2d 339; and *Cohn v. United Air Lines Transportation Co.*, 17 Fed. Supp. 865. An analysis of these cases, demonstrates that in each case the court was considering an enunciation of the doctrine of *res ipsa loquitur* which was for all practical purposes identical with that which is the law in California.

In the case of *LeJeune v. Collard* (La.), 44 So. 2d 504, the court refused to apply the doctrine, saying, at page 508:

“The doctrine of *res ipsa loquitur* has no application in this case because of the fact that the accident might have occurred through the negligence of the pilot, Le Jeune.”

It is interesting to note that in this case, and in the case of *Davies Flying Service v. United States*, 114 Fed. Supp. 776,¹ the court in each instance actually had no evidence as to whether or not the conduct of the deceased pilot in fact had anything to do with the fall of the aircraft, or the failure of the mechanism to function properly. The important thing is that the court in each instance recognized the *possibility* that the deceased pilot *could have done something*, negligent or otherwise, which *might have affected* the operation of the plane.

In *Piper v. Henson Flying Service* (Md.), 60 A. 2d 675, the evidence showed that the decedent had been advised to switch over to a second tank before flying. Shortly after the take-off, he crashed and was killed. An examination of the wreckage revealed that the gasoline selector valve was still on the empty tank. Under these circumstances the court refused to apply the doctrine of *res ipsa loquitur*. Obviously there, as here, there was physical evidence which would indicate that the accident may have been due to a voluntary action or contribution on the part of the decedent.

¹"Whether the fall was due to the negligence of the pilot or to some functional failure of the essential operating mechanism of the plane . . . or to some other fortuitous event which rendered the pilot helpless, remains an inscrutable mystery. . . . The most that can be said of the evidence is that it presents nothing more than circumstances upon which theories as to the cause of the tragedy may be multiplied, any one of which is as plausible as the other and all of which rest upon mere conjecture."

Davies Flying Service v. United States, 114 Fed. Supp. 776 at 778.

III.

The Evidence Was Clearly Insufficient to Support a Judgment Predicated Upon the Theory of Manufacturer's Liability.

The only circumstantial evidence that is referred to is the presence of foamite on a portion of the electrical system. There is not one scintilla of evidence which would justify the conclusion or reasonable inference that the presence of the foamite had any possible proximate causal connection with the fall of this particular aircraft. There is nothing to indicate the amount of foamite that had been involved, the actual nature of the disturbance which had caused the application of the original foamite, or any of the other circumstances. For all that appears from the record, the foamite may have gotten on the aircraft by reason of a problem which developed in proximity to the ship. There is nothing to indicate that any essential part of the aircraft was affected by any fire, or had anything to do with the ultimate crash of the aircraft. The electrical system was fully checked out. The plane had twice been flown with no indication of any problem in the electrical system. While it is true that circumstantial evidence may of course support a verdict, the evidence must be of such a character that the inferences to be drawn therefrom are *reasonable* under the circumstances. Jurors are not permitted to run wild in their deliberations and to place their verdict solely upon the ground of speculation and conjecture.

Reese v. Smith, 9 Cal. 2d 324, 328;

Wilbur v. Emergency Hosp. Assn., 27 Cal. App. 751;

Puckhaber v. So. Pac., 132 Cal. 363.

When all of the testimony is analyzed, one fact stands out, and that is the utter absence of any evidence to

indicate that the appellant, North American Aviation, Inc., was guilty of any negligent act or omission in connection with the manufacture of the jet aircraft in question. There is no evidence to indicate that the aircraft was not manufactured in strict compliance with the plans and specifications required by the U. S. Army and the contracts and specification plans entered into between the appellant and the U. S. Army. The evidence was uncontradicted that the engine was built by the General Electric Company and all that North American did was to install it in the aircraft [pp. 790-791]. Although the court refused to instruct on *res ipsa loquitur*, a burden was nevertheless placed upon the appellant to attempt to show the process of manufacture of the aircraft. The transcript demonstrates that the trial court was extremely impatient with the defense testimony and practically forced the appellant to conclude at a time when there were still *forty* witnesses under subpoena [R. 795]. Appellees fluff off the recent case of *Spencer v. Beatty Safway Scaffold Co.*, 141 Cal. App. 2d 875, 297 P. 2d 746, with an attempted distinction which is devoid of merit. This is a manufacturer's liability case, the defendant in that case having manufactured a scaffold. There was evidence of negligence in connection with the manufacture of the scaffold. The important thing about the case is that the court was confronted with a problem which was identical to that involved in the instant case. The plaintiff had been seriously injured (paraplegic) at a time when he was in close proximity to the bleacher lid which had been manufactured by the defendant as a part of a set of retractable bleachers. No one saw exactly what the plaintiff did. He had no recollection as to what he did immediately at the moment of the accident. It is obvious that he either fell, or was knocked from the bleacher when the lid fell upon him. The appellate court

(petition for hearing denied by Supreme Court) refused to apply the doctrine of *res ipsa loquitur* as a matter of law.

The court points out, "That defendant's negligence could possibly have been the cause is not sufficient."

It is small wonder that appellees practically ignore this crucial decision, since it is absolutely contrary to their position, both on the main proposition of the manufacturer's liability, and on the proposition of *res ipsa loquitur*.

The two big factors in the cause of a plane crash are failure of the plane itself or *something that the pilot did* [R. 601].

No one of course can tell us what Lt. Hughes actually did. We know now that we are talking about a man who after receiving his basic training had been flying for less than two years; who had practically no flying time in the F 86 F model plane; who had no instrument time *at all* in an F 86 F; who had not flown enough instrument time to keep his white card current at the time of his demise; who had flown no instrument time *at all* between September 28, 1953, and December 18, 1953,² that the particular flight was in instrument flight, *in instrument weather*, under conditions which have been responsible for many Air Force accidents.³ Why this young man was sent on this particular mission by the Army authorities under the circumstances is an inscrutable mystery. Certainly, however,

²Thus Harrison, appellees' witness, testified: His logs do not indicate from September 28, 1953 until the close of his log book that he had flown any instrument time. [R. 156.]

³Thus Pilot Frank Smith testified [R. 516-517]: "Q. Well, it is then necessary and proper to use instruments in going through that fog bank? A. It is entirely required. In the Air Force, our worst possible accident-involving condition is caused by pilots trying to fly visual flight rules under instrument flight rule conditions, where the pilot is actually trying to maintain contact with the ground when the conditions do not warrant such a thing. The Court: This was an instrument flight, wasn't it? The Witness: This was an instrument flight."

North American Aviation should not be penalized for any mistake the Army may have made in clearing Lt. Hughes in utter violation of its own regulations.

The fact remains that the Army for reasons of its own, whether due to some mistake in some branch of the Air Force, directed Lt. Hughes to fly the aircraft in question when the Army knew or should have known that Lt. Hughes was poorly qualified to handle this particular jet aircraft, and when they knew or should have known that his white card was not current and that he never did have a green card, and that his experience in jet aircraft had been extremely limited. Certainly appellant should not be penalized for some failure on the part of Army personnel to make certain that the very expensive, highly complicated jet aircraft, capable of speeds in excess of the speed of sound, was not placed in the hands of a young man, who after receiving his student training, had flown airplanes for less than two years. Appellees have completely missed the point of appellant's brief, when certain acts of the pilot were characterized by being possibly *non-negligent*. By this, appellant merely meant that there were certain acts that Lt. Hughes could have done which no one could characterize as being negligent and yet which could have been responsible for the crash of the plane. The concept of any voluntary act or contribution on the part of the plaintiff as a pre-requisite to the application of the doctrine of *res ipsa loquitur*, does not necessarily involve negligent conduct.

The many respects in which the pilot could have been guilty of both negligent and non-negligent conduct were fully set forth in the opening brief and no attempt will be made to repeat them here (see Op. Br. pp. 18-20).

It was pointed out in the opening brief that after the crash it was determined that the trim actuator was improperly set. *This evidence was uncontradicted.* There was evidence that the trim actuator is a *sturdy instrument*

and that the impact would not have affected the setting. This fact alone was sufficient to justify the conclusion that some conduct on the part of Lt. Hughes, whether through ignorance or otherwise, may have contributed to the crash. The testimony of the witnesses was uncontradicted that a failure to properly trim the ship under these circumstances would cause the nose of the ship to go down if the pilot even momentarily released his hand from the stick [R. 741]. The pilot's inexperience in the handling of this type of aircraft may well have accounted for his failure to properly trim the ship.

The hazard of the particular take off involved in this case with the transition of visual to instrument flight, with the failure to adequately warm up the gyro horizon mechanism, with the trim actuator being improperly set, with the possibility that the pilot, through inexperience in this plane and in weather of this type, had failed to control the ship, with the possibility that the pilot may have fainted, or have mistakenly hit one of the switches, or caused a throttle burst, or have done any one of a number of acts which might have affected the operation of the plane, all eliminate the conduct on the part of the defendant as indicating any greater probability of negligence than some negligent conduct or some conduct on the part of Lt. Hughes.

There is just as much reason to believe that if there was a flame out, that it was induced by the pilot, who obviously is in control of the throttle, the switches and all of the other controlling apparatus of the plane. The fact that the airplane was traveling at practically full throttle and was operating at a high rpm at the time of the accident would seem to appellant to eliminate the claim of a flame out in any event [see R. 666, 667, 672, 716-718].

In the very recent case of *Simmons v. Rhodes and Jamison*, 46 Cal. 2d 190, 293 P. 2d 26, the doctrine of *res ipsa*

loquitur was held not applicable where the plaintiff did not eliminate his own conduct as being a causative factor in the ultimate result. The Supreme Court of California stated as follows:

“The doctrine of *res ipsa loquitur* was not held applicable for the reason that when a plaintiff seeks recovery upon the theory that a commodity contains a foreign substance and admits that he added material to that delivered by defendant, plaintiff must affirmatively show that the substance he added did not cause the injury. *Zents v. Coca Cola Bottling Co.*, 39 Cal. 2d 436.

“Plaintiff may properly rely upon the doctrine of *res ipsa loquitur* even though he has participated in the events leading to the accident, if the evidence *excludes his conduct as the responsible cause*. . . . In the case at bar, plaintiff did not offer any evidence to show that the water he had added to the cement had no effect.”

Simmons v. Rhodes & Jamison, 46 Cal. 2d 190 at 203.

In *Burr v. Sherwin-Williams Co.*, 42 Cal. 2d 682, the Supreme Court, in refusing to apply the doctrine of *res ipsa loquitur*, states:

“The fact that an accident occurred after the defendant relinquishes control of the instrumentality which causes the accident, does not preclude application of the doctrine provided there is evidence that the instrumentality had not been improperly handled or its condition otherwise changed after control was relinquished by the defendant.”

The burden of proving that the instrumentality has not been improperly handled is not a burden which rests upon the defendant manufacturer, but is a burden which rests

upon the plaintiff. In attempting to show that the instrumentality has not been improperly handled or its condition changed, or that the conduct of the plaintiff did not in some fashion contribute to the accident, the plaintiff is not entitled to rely upon the presumption of due care.

Spencer v. Beatty Saffway Scaffold Co., 141 Cal. App. 2d 875 (petition for hearing denied by Supreme Court, 1956 case).

See also:

Danner v. Atkins (1956), 47 A. C. 333;
Barrera v. De La Torre, 48 A. C. 146.

Conclusion.

It is respectfully submitted that the judgment should be reversed. It is only by resort to the rankest type of speculation and conjecture that this court can sustain the judgment. To do so in the face of the uncontradicted evidence, would emasculate the requirements for the application of the doctrine of *res ipsa loquitur* as laid down by the Supreme Court of the State of California. Where the record is replete with evidence that the conduct of the decedent may have contributed or caused the crash of the plane and where the appellees have not introduced any evidence to indicate that the accident was not due to any voluntary act or contribution on the part of Lt. Hughes.

Respectfully submitted,

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HENRY E. KAPPLER,

Attorneys for Appellant.



APPENDIX "A."

LT. HUGHES' FLIGHT RECORD [R. 148]

Cumulative totals

- | | |
|---|----------|
| 1. Basic training, i.e., student pilot [R. 130], completed 3-22-1952, | 279 hrs. |
| 2. April 1952
Total April flight time, 14 hrs. consisting of 8 hrs. contact, 3 hrs. hood ¹ and 3 hrs. <i>actual</i> instrument [R. 118] | 293 |
| 3. May 1952
Total May flight time, 26 hrs., consisting of 7 hrs. hood, 19 hrs. contact. <i>No actual</i> instrument time [R. 120] | 319 |
| 4. June 1952
During this month Lt. Hughes had 5 hours of Link trainer ² time, 2 hrs. and 20 min. <i>actual</i> instrument flight [R. 122] | 325 |
| 5. July 1952
25 hrs.—no <i>actual</i> instrument, but apparently 5 hrs. Link trainer time [R. 124] | 350 |

¹Hood time. This is simulated instrument flying where the pilot is under a hood using instruments. No visual reference is made to the ground. *Someone else* is obviously along. [R. 120.]

²Link trainer time. Plaintiffs' witness Ross Harrison describes the Link trainer as follows: "A link trainer is an airplane . . . a *model* one . . . the pilot gets in . . . and has instruments, but his control of the stick and the rudder simulate instrument flying and he must control it. There is a graph over here that records just what he is doing. . . . [R. 121.] It is a fixed instrument and does *not* leave the ground." [R. 122.]

6. August

As of the end of Aug. 1952, Lt. Hughes had flown only "3 hrs. weather instrument, which is actual instrument . . ." [R. 126] and 10 hrs. of hood or simulated flying. Of the total time of 382 hours only 103 hrs. was jet propulsion [R. 126] 382

7. September 1952

Lt. Hughes logged only 2 hrs. of flying time during Sept. 1952 [R. 130] 384

8. October 1952

No instrument flying [R. 130]

9. November 1952

Oct. and Nov. 11 hours total flying time [R. 130] 395 [R. 133]
(First indication of *combat* time—obvious, though that *training* continued. See R. 131. Combat time was likewise broken down in the log between contact and visual [R. 133]. No instrument flying in either Oct. or Nov.

10. December 1952 (1 year before death)

35 hours total visual [R. 133] No instrument flight in Dec. 1952 430 [R. 134]

11. January 1953

23 hrs. total flying time. Of this there was 1 hr. instrument flying and 30 min. hood time 453 [R. 135]

12. February 1953
26 hrs. total flying time, of which
there was 1 hr. instrument flying
[R. 135] 479 [R. 136]
13. March 1953
23 hrs. total flying time. Of this,
approx. 45 min. was actual instru-
ment flying [R. 137] 502 [R. 137]
14. April 1953
17 hrs. total flying time, of which
30 min. was hood time [R. 137] 519 [R. 138]
Lt. Hughes was suspended from
flying status on 4-19-53 for physi-
cal reasons not disclosed [R. 138]
15. May 1953 and June 1953
Separate totals were not available
for the months of May and June,
but it is obvious that the total fly-
ing time for these 2 months was
54 hours. Of this time, only 2
hrs. and 50 min. was actual in-
strument flying during May [R.
139-140.] During June, Lt.
Hughes had only 20 min. actual
instrument flying time [R. 142] 573 [R. 143]
16. July 1953
There is no record of any flying
between June 18, 1953 and Au-
gust 12 when Lt. Hughes re-
sumed duty [R. 143-144]. Ap-
parently, however, between June
and July, he flew a total of 10
hrs., *none* of which was instru-
ment time 583 [R. 144]

17. August 1953

This is the key to *entire picture* [R. 144]. At this time, a mere *three* months before his death, Lt. Hughes' record was as follows [R. 144]: "His total first pilot time is 296 hours and 40 minutes. His instrument time is *11 hrs.*, night time is 9 hrs., 15 hrs. under the hood (which is simulated instrument) which brings his total time to 583 hours and 15 minutes."

In other words, Lt. Hughes, $3\frac{1}{2}$ months before his death, had only 11 hours of *actual instrument time* [R. 144].

18. September 1953

Lt. Hughes had *no instrument time during September.*

19. October 1953

No instrument time.

Lt Hughes' total flying time for September and October was only 19 hrs. and 45 min., with no instrument time, actual or simulated 602.45 [R. 145]

20. November 1953

Flying time 17 hrs., of which 4 hrs. was hood time and 30 min. was actual instrument flying 619.30 [R. 146]

21. December 1953

Flying time in Dec. to time of death on Dec. 18, 1953, was 8

hrs. and 30 minutes, and no instrument time was logged during this period 627 [R. 146]

From the foregoing recapitulation we learn that Lt. Hughes at the time of his death had a total flying time of 627 hrs. [R. 147]

Of this, student training time was 279 [R. 148]

Flying time exclusive of training time as a student 348 hrs.

Thus we observe that other than time spent as a student, Lt. Hughes had only 348 hours of flight time.

Of this total of 627 hours there was the following:

1. Actual instrument time 11 hrs. 45 min.
2. Link trainer time 10 hrs.
3. Hood time 15 hrs. 30 min.

His total time spent in training and flying with instruments, *including* Link trainer time, where the device never leaves the ground, was less than 36 hours.

APPENDIX "B."

A. John Ross Rinaldi. This witness actually saw the ship in question go into the fog bank and disappear from sight [R. 423].

B. John C. Bryan, who was in charge of the test flight schedule. There were 18 test flights booked for the day in question, but *all* of them were cancelled because of the weather conditions [R. 307]. This testimony was not based merely upon this man's recollection, but upon records which were made at the time, and which disclosed weather conditions [R. 308]. Even the trial court recognized the importance of the weather problem when it overruled an objection to a certain phase of this witness's testimony. The court stated at page 309: "The defendants say there was contributory negligence on the part of the operator of the plane. The question of the weather and the field on that particular day may be very important as to whether it was proper to take a plane off the field at that particular time."

C. Richard B. Gottschald testified that the weather at the time of the accident was foggy. The fog was low to the ground, particularly at the west end of the runway [R. 285].

D. Witness Frank Smith, a veteran pilot, saw the aircraft on take off. The take off appeared to be ordinary with the exception of the fact that "we felt it was rather strange he should be taking off in adverse weather conditions" [R. 513]. At that time Bryan had called off flying for the day. An official report showed ½-mile visibility due to the obscuration, but according to Smith, the weather at the moment of take off was worse than that [R. 513]. He described it as follows: ". . . There was a fog bank, which is common and not too normal to the Los Angeles area, was inland from the shore, being partially over the western end of the airport,

a very low, dense fog bank. Q. Did that come down to the ground? A. It did. Q. Was it a condition of weather that would require the use of instruments? A. *It was, very definitely."*

The importance of the instrument take-off as compared to the visual flight rules and the misleading situation that may exist where a fog is rolling in, and there is at the start of the runway relatively clear weather, with the plane taking off into the rapidly incoming fog, is fully described by Pilot Smith on pages 514 and 515. As he pointed out, this type of fighter aircraft is *very sensitive* to control pressure on the stick. One of the worst possible accident-involving conditions is caused by pilots attempting to fly visual in a restricted situation, or the *transition* between a visual situation and an instrument situation [R. 516-517]. In other words, if there is an actual weather condition, and no element of visual contact, i.e., a true instrument flight, there is no transition, but where, as here, there was some visibility, but with a transition into a rapidly moving and approaching fog bank, there is a reaction that may get the pilot in trouble.

Obviously from this testimony, *lack of instrument flying experience or flying experience under the conditions as prevailed on the day in question, could easily account for a failure on the part of the pilot to properly control the ship.*

E. Joseph Kinkella testified that he was driving north on Lincoln Boulevard. He did not see the crash of the plane. He estimated that visibility was extremely limited due to what he described as a dense fog [R. 537]. This man had approximately 5,000 hours of flying time, of which 800 to 900 hours was logged in F 86 jets [R. 534]. This pilot likewise pointed up the possibility that the pilot may have attempted to maintain visual contact until the last minute. He stated, ". . . It is most difficult for even a most experienced pilot, say with 3,000 to 4,000

hours of time, and lots of instrument time, to make the transition to instrument flying smoothly, and just when you are taking off, you are going to have to make it very smoothly, because a very small movement of the stick might mean a couple of hundred feet, and you just wouldn't have that kind of altitude right on take off [R. 542]. More important, however, is Kinkella's statement that in order for a man to take off in weather of a type involved on the day in question, he should be "*current on instruments.*" He should have flown instruments lately at altitude in this type of aircraft. I would say, to make an instrument take off of that type, he should have at least 5 hours of instrument time in the *last two or three months* [R. 544].

The only reasonable inference that can be drawn from the foregoing, and there is none in the record to the contrary, from any witness, is that instrument flying is not something which a person learns and then is required to no longer practice, but is a skill which requires *constant attention*, thus the requirement that in order to hold the white card current, the pilot must fly a specified number of hours per month.

F. Charles Edward Kunzler. This man testified that he was the operator of a crash truck, was thoroughly familiar with the flight of airplanes and take offs and actually observed the take off in question. He saw it disappear into a fog bank. "It was just like a wall of fog that came in at the end of the runway." [R. 557.] After the aircraft entered the fog bank he could not see it at all.

G. G. E. Beaudry, a guard at the airport, watched the aircraft take off and observed that it went into a fog bank after he was approximately 20 to 25 feet in the air, after which he could not see him at all [R. 575].

H. William Pitts testified that he likewise observed the plane go out of sight into the fog bank [R. 640].

No. 15292

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NORTH AMERICAN AVIATION, INC., a corporation,

Appellant,

vs.

WANDA LEE HUGHES and RANDALL L. HUGHES, a minor,
by his Guardian *ad Litem*, HARRY SUTTON,

Appellees.

PETITION FOR REHEARING.

CRIDER, TILSON & RUPPE, and

HENRY E. KAPPLER,

548 South Spring Street,
Los Angeles 13, California,

Attorneys for Appellant.

FILED

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No. 15292
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

NORTH AMERICAN AVIATION, INC., a corporation,
Appellant,

vs.

WANDA LEE HUGHES and RANDALL L. HUGHES, a minor,
by his Guardian *ad Litem*, HARRY SUTTON,
Appellees.

PETITION FOR REHEARING.

To the Honorable Justices of the United States Court of Appeals:

Appellant presents herewith its petition for rehearing upon the grounds hereinafter set forth.

A rehearing is vital and essential in this case which is critical to the entire aircraft industry. This Court in a unique and almost unprecedented decision, made without the citation of a single authority, has laid down a precedent which may well open the flood gates of litigation against the manufacturer of all aircraft without the necessity of proof of any substantial evidence of negligence in manufacture and under circumstances imposing a virtual insurer's liability against the manufacturer.

This case represents a radical departure from fundamental and basic principles of law. The opinion as well as the judgment is predicated solely upon speculation and conjecture.

Vague possibilities are magnified out of all proportion to their actual significance. The decision will serve only to confuse the aircraft industry. It is impossible to ascertain the nature or character of the alleged defect which the appellant manufacturer is charged with in the manufacture of this airplane. It is impossible to ascertain what negligent act or omission on the part of North American was responsible for the crash of the jet aircraft.

Petitioner respectfully requests that this Court grant a rehearing to the end that appellant may have an opportunity to demonstrate to this Court the error involved in this decision.

Grounds for Rehearing.

1. This Court has erroneously assumed that the question presented by this appeal is "Man or Machine," when the sole and basic issue is whether or not the appellant as manufacturer of an aircraft, was guilty of any negligent act or omission which was *the sole proximate cause* of the crash of the plane and the death of the decedent.

2. The Court's decision is contrary to previously decided cases in California and other jurisdictions relating to the liability of a manufacturer.

3. The Court erroneously stated that there was “substantial evidence” to support appellees’ theory that the crash was due to a mechanical defect which developed while the plane was still in the air, that is, a defect in the manufacture of the plane, without indicating what evidence this Court believed supported such a theory.

4. The Court has actually applied erroneously the doctrine of *res ipsa loquitur* to this case in an effort to support the judgment, although the doctrine is not mentioned, and its application cannot be justified under the California cases.

5. The Court has failed to cite any authority for its opinion and has refused to pass upon the applicability of the doctrine of *res ipsa loquitur* which was discussed by both parties to this appeal.

ARGUMENT.

I.

This Court Has Erroneously Assumed That the Question Presented by This Appeal Is "Man or Machine," When the Sole and Basic Issue Is Whether or Not the Appellant as Manufacturer of an Aircraft, Was Guilty of Any Negligent Act or Omission Which Was the Sole Proximate Cause of the Crash of the Plane and the Death of the Decedent.

The very first sentence of the opinion indicates the reaction of this Court to this case in three words, "Man or Machine." This concept of the lawsuit, it is respectfully submitted, has derailed the judicial thinking, and as a result, the Court has not truly delineated the basic issue in the lawsuit, which is simple. The sole and only issue which is really involved, is whether or not the appellant, North American, was guilty of some negligent act or omission in the manufacture of the aircraft in question which proximately caused the crash and ensuing death of the pilot.

The Court's disjunctive suggestion of "Man or Machine" is inaccurate as applied to this case, since the accident may well have been unavoidable, in which event neither man nor machine would be responsible, and in any event appellant would not be responsible. Likewise if the failure of the plane was due to a latent defect in the jet motor furnished by General Electric no liability would attach to North American. Appellant is only responsible if during the process of the manufacture of the aircraft in question, it was guilty of some negligent act or omission which proximately caused the crash of the plane. No matter how much the evidence is tortured, there is an utter lack of evidence, let alone substantial

evidence, to indicate that the appellant was guilty of any negligence in connection with the manufacture or construction of the aircraft.

Although the Court has set forth the contentions of both sides, it cannot be determined from reading the last paragraph of the opinion, to what extent this Court believed that there was evidence of negligence in manufacture as claimed by appellees.

This Court has overlooked the basic and fundamental proposition that no judgment can be sustained if the essential facts require conjecture and speculation.

Reese v. Smith, 9 Cal. 2d 324, 328;

Wilbur v. Emergency Hosp. Assn., 27 Cal. App. 751;

Puckhaber v. So. Pac. Co., 132 Cal. 363;

Chesapeake and Ohio Ry. Co. v. Thomas, 198 F. 2d 783, 788.

At page 7 of the opinion, the very character of the speculation which appellees and this court engage in is demonstrated on the face of the opinion, where it is suggested that a possible and *perhaps likely* source of the "trouble" as the plane took off in an attitude of climb which is suggested as "not being very fast," was the possibility of a broken or leaking fuel line. Having speculated to this extent, the Court then apparently concludes in accordance with appellees' speculation that the pilot *may* have had trouble with the flight control system, and sought to switch to the emergency system, but before this could be accomplished the leaking fuel *may* have been ignited by a spark from the defective wiring or otherwise. (Opinion, p. 7.) Actually there is not one scintilla of evidence in the record that there was in fact any

defective wiring. The plane was flown through two test flights without the slightest problem in regard to the wiring of the aircraft. The Court then speculates that “undoubtedly the pilot then lost control, *probably* because of an explosion in the cockpit.” This Court then reaches the conclusion that the crash was due to a mechanical defect which developed while the machine was in the air—a defect for which the appellant was responsible. The entire structure of the opinion is predicated upon one bit of speculation added to another to form a mass of conjecture, by which it is sought to be said that “substantial evidence” exists in support of the judgment.

II.

The Court's Decision Is Contrary to Previously Decided Cases in California and Other Jurisdictions Relating to the Liability of a Manufacturer.

The trial court accurately instructed the jury on the duty of a manufacturer. It is well settled that the mere fact that there is some type of a defect in the product does not establish liability if the manufacturer has exercised ordinary care in connection with the manufacture and preparation of the product. (See Appendix C, Op. Br. p. 8.)

The duty of the manufacturer is very simply stated in the case of *Maryland Casualty Co. v. Ind. Metal Products Co.*, 203 F. 2d 838 at 842, where the Court states:

“It may be stated as a general rule that a manufacturer is required to exercise reasonable care in manufacturing an article which if carelessly manufactured, is likely to cause more than trivial harm to those who use it in the manner for which it is manufactured. Restatement of Torts Sec. 395. However, the defendant is only required to exercise rea-

sonable care, and the burden is on the plaintiff to show that the defendant has failed to exercise such care in one or more of the particulars in which reasonable care is required for the protection of those whose safety depends upon the character of the chattel."

The rule was likewise stated by the trial court accurately in the instruction heretofore referred to, B. A. J. I. No. 218:

"Duty of Manufacturer. The manufacturer of a product that is either inherently dangerous or reasonably certain to be dangerous if negligently made, owes a duty to the public generally and to each member thereof who will become a purchaser or user of the product. That duty is to give an appropriate warning by label or otherwise of any known dangers which the user of the product ordinarily would not discover and to exercise ordinary care to the end that the product may be safely used for the purpose for which it was intended and for any purpose for which its use is expressly or impliedly invited by the manufacturer. Failure to fulfill any such duty is negligence.

"When in the manufacture of such a product use is made of any material or part obtained from a source outside the manufacturing plant in question, it is the duty of the manufacturer to make such inspections and tests of that imported material or part as ordinary prudence would indicate to be necessary, to the end that the safety of the finished product for the intended or invited use will be reasonably certain. Failure to fulfill that duty is negligence.

"On the other hand, if the manufacturer performs that duty, and the inspections and tests do not indicate a defective or dangerous condition, and it does

not know of such a condition, it is not liable for injury resulting from its use of such material or part, although it proves to be defective." (Appendix C, p. 8.)

This rule is predicated upon the many cases which have followed the famous case of *McPherson v. Buick Motor Co.*, 217 N. Y. 383, 11 N. E. 1050, and is to be found in California in such cases as *Sheward v. Virtue*, 20 Cal. 2d 410; *Stultz v. Benson Lumber Co.*, 6 Cal. 2d 688, and *Judson Pacific-Murphy, Inc. v. The Stove Co.*, 127 Cal. App. 2d 828.

The Supreme Court of the United States, in referring to the famous case of *McPherson v. Buick Motor Co.*, stated as follows: "There must be knowledge of a danger, not merely possible, but probable."

McPherson v. Buick Motor Co., 217 N. Y. 383,
11 N. E. 1050.

Dalehite v. United States, 346 U. S. 15 at 42.

The record in this case is devoid of any evidence that North American had any knowledge that there was anything wrong with the airplane in question. The record is devoid of any evidence indicating knowledge, either *possible or probable*, that there was any defect in the plane. On the contrary, the evidence indicates that North American had inspected this plane in every facet of its development from the time its manufacture was started until it was delivered. Each part was progressively inspected, the components and all of the systems. [P. 333.] At least 225 inspectors were involved in these part-by-part inspections of the aircraft in question. There is no evidence to show that the defendant was negligent in connection with any of the inspections.

Appellees brought to the attention of this Court the suggestion that the plane *may* have been damaged by *some* type of fire in the electrical system. The testimony in this particular facet of the case was extremely vague. This Court with reference to that subject matter states as follows:

“Foamite was found on part of the electrical system as the plane neared final assembly, indicating a fire. The parts affected by the fire were not replaced or inspected for damage after the fire. This is indicated by the presence of foamite, and that the only thing required by the inspector was to ‘clean it off.’” (Opinion, p. 7.)

There is not one scintilla of evidence in the record which would indicate that there had actually been a fire within the electrical system itself which had in any manner *affected the electrical system or the airplane*. Foamite is merely a material which is used to fight fires. There is nothing in the evidence to indicate that the foamite itself would have any effect upon the airplane or upon the electrical system, and the uncontradicted evidence was that an inspector had directed that the foamite be cleaned off. The very fact that an inspector had made such a direction would indicate that nothing had happened to the electrical system. This entire bit of evidence raises nothing but conjecture and speculation which cannot afford the basis for any fair inference that the mere presence of the foamite or the use of the foamite had any possible causal connection with the ultimate crash of the plane or in any manner indicated that the manufacturer was guilty of any negligent act or omission. From this single entry respecting the foamite, the appellees would have this Court believe, and apparently this Court did believe, that the wiring was defective and that this in

turn might possibly have caused a spark to develop somewhere which might possibly have had some effect upon a possible leaking fuel line. Appellant can only suggest that the inferences which this Court draws are not fair or reasonable inferences and are based upon the rankest type of speculation. During the progress of the building of the plane, it is possible that paper or other material in proximity to the airframe may have ignited and caused some type of a minor fire on the floor of the plane, which was put out by the application of foamite. In the course of such a procedure it is possible that some of this preparation may have gotten upon the airframe itself. That this is the most probable explanation is indicated by the very fact that the inspector merely required that the foamite be cleaned off the airframe. The suggestion of appellees that "The parts affected by the fire were not replaced" is utterly unfounded in that it assumes that there was some part of the plane which was affected by the fire. The results of litigation of the type involved herein should not depend upon speculative evidence of this type.

The effect of the Court's decision is to impose an insurer's liability upon the appellant. The Court in effect has said that the *mere presence of an unidentified defect will establish liability upon the manufacturer*. This of course is contrary to the many cited cases. It must be kept in mind that the engine, for example, and other component parts of this plane, were purchased from other manufacturers, such as General Electric. The evidence was uncontradicted that appellant conducted such tests of the compo-

ment parts as were reasonable, and there was *no evidence to the contrary*. The law relating to the liability of a manufacturer who incorporates a component part, such as an engine, is well stated in *O'Rourke v. Day and Night Water Heater Co.*, 31 Cal. App. 2d 364, where at page 370 the Court affirmed a judgment notwithstanding the verdict, holding that as a matter of law the manufacturer was required to exercise only ordinary care in connection with its examination of the component parts involved in the finished product. The Court states at page 370:

“The article in question, the safety pilot, came to the respondent as a sealed unit. Its very nature precluded an internal inspection and any such inspection would have necessarily destroyed the adjustment of its parts, which was essential to its operation. In such a case as this the rule relied upon by the appellants does not require the making of inspections and tests of this complicated and delicate device which destroying the usefulness of the article.

“We conclude that the rules in question did not require the respondent to make internal inspections and tests of this complicated and delicate device which came to it finely adjusted and sealed, and that under such circumstances such external inspections and tests as were possible were all that was required of it in the exercise of ordinary and reasonable care. There being no evidence of negligence on the part of the respondent, it follows that the action of the court was correct.”

III.

The Court Erroneously Stated That There Was "Substantial Evidence" to Support Appellees' Theory That the Crash Was Due to a Mechanical Defect Which Developed While the Plane Was Still in the Air, That Is, a Defect in the Manufacture of the Plane, Without Indicating What Evidence This Court Believed Supported Such a Theory.

Actually the court has not pointed out what substantial evidence is referred to. If by substantial evidence it is meant to incorporate the summary of appellees' argument contained on page 7 of the opinion, it is submitted that every part and parcel of this argument is predicated purely upon speculation.

It is impossible for petitioner to reconcile the statement of this court that "although the true cause of the accident will probably remain a mystery" with the court's statement that there was substantial evidence to support the proposition that there was a mechanical defect in the manufacture of the plane, for which the appellant was responsible. (Opinion, p. 8.)

It occurs to appellant that if the cause of the accident is a "mystery," it is just as "mysterious" to determine the mechanical defect, that appellant was responsible for, which caused the crash of the plane.

If the true cause of the accident was a mystery, how can it be said that the conduct of the pilot was non-contributory? How can it be said that the crash was not due to some mechanical defect for which appellant

North American could not be responsible, such as some *latent* and *hidden defect* contained within the jet motor itself, which was built by General Electric Company, and merely installed in the aircraft after being checked. [Tr. p. 790.] Obviously appellees failed to sustain the burden of proving negligence which proximately caused the crash of the plane.

Appellees have suggested that there was mechanical failure, caused by a flame out, and this Court has apparently adopted appellees' statement that there was substantial evidence to support appellees' theory. North American could *not* be responsible for a flame out which was caused by some latent or hidden defect within the motor which had been manufactured by General Electric and which was not even purchased by North American, but was owned and purchased by the Army and merely installed by North American. There is not one scintilla of evidence to even suggest that North American had been negligent in installing the jet motor in question. If there was a flame out and if that was the cause of the crash, and if there was a defect in the jet motor, this court has saddled North American with a liability without fault.

IV.

The Court Has Actually Applied Erroneously the Doctrine of Res Ipsa Loquitur to This Case in an Effort to Support the Judgment, Although the Doctrine Is Not Mentioned, and Its Application Cannot Be Justified Under the California Cases.

In the ordinary manufacturer's liability case, the burden, as has been heretofore pointed out, rests upon the plaintiff to establish that in some respect the manufacturer has been guilty of some negligent act or omission in connection with the manufacture of the product. This proof may be developed in a variety of methods. For example, it might be ascertained in a particular case that after an accident, a component part had been completely omitted from the machine. A plaintiff might present evidence, as in the case of *Northwest Air Lines v. Glenn L. Martin*, 224 F. 2d 120, that there had been a structural weakness in the design of the aircraft; that other planes of the same type and design had failed because of this same basic structural weakness, with expert testimony to establish this proposition. No such evidence appears in this case. There is not one scintilla of evidence that the plane was manufactured other than in strict accordance with the army specifications. There is no evidence that any part of the plane was defective or that the defendant had knowledge of the fact that any part of the plane was defective. Even assuming that it might be inferred from the evidence that there was some defective part of the plane, the evidence did not

point to any defect of which the appellant had knowledge, as opposed to any defect in some portion of the plane, such as the engine, for which the appellant could not possibly have been responsible, to wit, a latent defect occurring within some portion of the highly complicated and developed jet engine, manufactured by General Electric. Under the rule of the case of *O'Rourke v. Day and Night Water Heater Co.*, 31 Cal. App. 2d 364, North American cannot be held responsible for any flame out, or failure of the jet motor.

Probably the reason for the opinion which the Court wrote was that this Court was unable, just as respondent has been unable, to put its finger upon the cause of the accident. Accordingly, the Court in effect has bypassed the laws relating to manufacturer's liability and has imposed either an insurer's liability upon the appellant or has, without mention thereof, in effect applied the doctrine of *res ipsa loquitur*.

Under all of the recent California cases, the doctrine is obviously inapplicable. The burden was not upon the appellant to establish that the pilot did in fact cause the accident. In order for the doctrine of *res ipsa loquitur* to apply, the plaintiff must establish certain preliminary facts, to wit:

1. The accident must be of a kind which does not occur in the absence of someone's negligence;
2. The accident must be caused by an instrumentality within the exclusive control of the defendant;

3. The accident must not have been due to any voluntary action or contribution on the part of the pilot.

Ybarra v. Spangard, 25 Cal. 2d 486;

Lents v. Coca-Cola, 39 Cal. 2d 436.

The latter requirement for the application of the doctrine of *res ipsa loquitur* places the burden upon the plaintiff of establishing *no fault or contribution on the part of the decedent*. Even in a case where the presumption of due care is available to the person claiming the benefit of the doctrine of *res ipsa loquitur*, if the evidence shows that the injury could have been caused by the voluntary act of the decedent, the doctrine cannot apply.

Spencer v. Batty Saffway Scaffold Co., 141 Cal. App. 2d 875;

La Porte v. Houston, 33 Cal. 2d 167.

More basic is the observation of the Supreme Court of California in the case of *La Porte v. Houston* (*supra*), where the court refused to apply *res ipsa loquitur* where there was no balance of probability in favor of negligence on the part of defendant, saying:

“It was at least equally probable that the accident was caused by some fault in the mechanism of the car, for which defendants were not liable, as that it resulted from any negligent act or omission of the mechanic. Accordingly, it cannot be said that it is more likely than not that the accident was caused by the negligence of the defendants, and hence the case was not a proper one for the application of the doctrine of *res ipsa loquitur*.”

This Court has fallen into grievous error because even if it be assumed that there was a mechanical defect which developed while the machine was in the air, there is nothing to indicate that the defect did not arise by reason of some portion of the plane with reference to which North American was not a manufacturer. Under these circumstances it was at least equally probable that the accident would have been caused by some defect for which the defendant was not responsible. Even assuming that there was some defect in the fuel line, that fact alone does not establish negligence on the part of North American, if they had exercised ordinary care in manufacturing and inspecting the plane. It is common knowledge that in all types of machinery, flaws or defects occur which defy discovery by human ingenuity. It is impossible for this Court or anybody else to say what defect there was, if any, in this particular plane—probably this Court has stated it about as well as anybody could state the matter when it says that the cause of the accident was a mystery. Being a mystery, it is not difficult to understand the inability of this Court to put the finger upon some particular act or omission on the part of the appellant as being the cause of the accident.

V.

The Court Has Failed to Cite Any Authority for Its Opinion and Has Refused to Pass Upon the Applicability of the Doctrine of Res Ipsa Loquitur Which Was Discussed by Both Parties to This Appeal.

Appellant has seldom seen a case where even though the chief contention of the parties related to the insufficiency of the evidence to justify the judgment, an opinion could be written of tremendous importance to the entire aviation industry, without the citation of a single authority. The difficulty of attacking this case on appeal has been tremendous and it is just as difficult on this petition for rehearing, for the simple reason that petitioner here, as in its original presentation and in the trial court, has been unable to determine the actual cause of the crash and has been unable to determine from the record any evidence of negligent conduct on its part. The Court has refused to even consider the many cases cited by both counsel on the doctrine of *res ipsa loquitur*, and yet in effect has applied the doctrine. A rehearing should be granted for the purpose of clearing up this opinion and stating the evidence which indicates some negligent act or omission on the part of appellant and petitioner. The case, more than any case that counsel have ever observed, consists of a maze of speculation. It is no different than the man who attempts to add a column of 24 zeros. When he draws his line at the base of the column of zeros and adds them up, the result is still zero. When all of the so-called evidence in favor of the appellees is piled up, there is not one single piece of this evidence, individually or added up, which establishes on a substantial basis or otherwise, that the appellant was

guilty of any negligent action in connection with the manufacture of the aircraft. There is not even any evidence that in fact there was any defect, whether appellant was responsible for the defect or not. It is suggested that the fuel line may possibly have ruptured. It is suggested that there may have been some trouble in the electrical system. It is suggested that the pilot may have attempted to switch to the emergency system. It is suggested that there may have been a spark caused by some defective wiring, although no such defect is established, inferentially or otherwise. It is suggested that the pilot may have lost control because of an explosion in the cockpit. It is suggested that the electrical-hydraulic system may have failed. It is suggested that a fire may have been the proximate cause of the accident.

Each and every one of these suggestions is nothing more than pure speculation. If it were otherwise, this Court would not have made the statement that the cause of the accident was a mystery. There would have been no necessity for such a statement and the Court in all good conscience could have said that there was substantial evidence to support the conclusion that there was a mechanical defect which existed in some particular portion of the plane, which caused the crash.

Conclusion.

It is respectfully submitted that this Honorable Court has fallen into grievous error in connection with its opinion in this case. That the basic flaw in the opinion relates to the statement of the Court that the appellant was responsible for a mechanical defect which developed while the machine was in the air. This is not the law and cannot be the law.

Applicant is responsible under its manufacturer's liability obligation where it has been shown by a preponderance of the evidence that the appellant was negligent in connection with the manufacture of the plane and that this negligence was the proximate cause of the accident. The evidence falls far short of any such a showing. Even if it be assumed that there was some type of a defect in the plane, the exact character unknown, the defect may just as well have been in the motor, for which defect appellant under well settled rules would not have been responsible. The possibility or probability that any defect may have been a latent defect in the motor, the possibility or probability that the cause of the crash may have been due to some voluntary act on the part of the pilot renders the verdict nugatory, because no one can say that the cause of the crash was anything other than a mystery, and under these circumstances the appellant should not bear the burden of this loss, where the evidence is in such a state that it is just as probable that the crash was caused by negligence on the part of General Electric or negligence on the part of the deceased pilot as it was due to any negligent act or omission on the part of North American.

It is respectfully submitted that this Court should grant this petition for rehearing.

Respectfully submitted,

CRIDER, TILSON & RUPPE, and
HENRY E. KAPPLER,

Attorneys for Appellant.

Certificate of Counsel.

I, Henry E. Kappler, one of counsel for the appellant, in the above entitled cause, hereby certify that in my judgment, and in the judgment of all other counsel for appellant, the petition for rehearing is well founded and that it is not interposed for purposes of delay.

HENRY E. KAPPLER



No. 15,292

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NORTH AMERICAN AVIATION, INC., a corporation,

Appellant,

vs.

WANDA LEE HUGHES and RANDALL L. HUGHES, a Minor,
by his Guardian *ad Litem*, HARRY SUTTON,

Appellees.

REPLY TO PETITION FOR REHEARING.

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REPLY TO PETITION FOR REHEARING.

Introduction.

The petition for rehearing is based upon one theme which is that there is no evidence to support the verdict of the jury. This is a head in the sand position.

I.

Circumstantial Evidence Is Not Speculative.

There is substantial affirmative credible evidence to support the verdict and the opinion of this court. This evidence is not speculative or uncertain. Some of it is circumstantial, but circumstantial evidence is not necessarily speculative.

Supplied with the evidence which may be in part circumstantial, it is for the jury to determine the issues.

Undoubtedly the jury came to a conclusion as to what happened and why. Having no way to ascertain at this point just what the jury concluded, it is the accepted appellate rule in such cases that if the evidence is such as to support the verdict on any combination of facts, which is supported by the evidence, the verdict must be sustained. The opinion of the court properly applied the rule.¹

II.

Appellant Was Careless in Manufacturing the Plane.

From the unexplained presence of an *electrical* fire in the fuselage of the plane in the course of manufacture² and the callous indifference of the manufacturer's inspector³ and the fact of the accident itself,⁴ the jury was warranted in concluding that appellant was careless in manufacturing the plane.

¹*Jaffke v. Dunham* (Jan. 14, 1957), 352 U. S. 285, 1 L. Ed. 2d 314.

²Appellant's witness, Mr. Clayton, testified: "The only reason there would be any foamite in there would be if we had an *electrical fire* in the assembly." [R. 810.] (Emphasis added.)

³Appellant's witness, Mr. Clayton, read the inspector's notation on the squawk sheet relative to the *electrical fire* in the fuselage as follows: "Due to use of foamite cleaner, it looks like, or due to use of foamite, clean all relay boxes and terminal connectors, such as reverse current relay, field current relay, armament relay, and so on." [R. 810.] It is within the province of the jury to infer that the inspector's attitude was to brush off the foamite so that the fact there had been an electrical fire wouldn't be noticed.

⁴*Sullivan v. Shell Oil Company* (C. A. 9th, 1956), 234 F. 2d 733.

Paxton v. County of Alameda (1953), 119 Cal. App. 2d 393, 408, 259 P. 2d 934.

III.

The Pilot Did Not Contribute to the Accident.

The pilot is dead and concededly the presumption of due care applies to preclude any speculation that he was contributorily negligent.⁵ There is affirmative evidence that there was a flame-out⁶ followed by an explosion in the air⁷ and that the plane was afire in the air.⁸ This is most certainly ample evidence of mechanical failure.

Appellant's briefs urged that there was a possibility that the pilot contributed to the happening of the accident in a non-negligent way. The authority which appellant relied upon was distinguished in appellees' brief,

⁵Appellant's Opening Brief, pages 35-37.

⁶The incident report which was admitted without objection reads: "Subsequent reports from the City Operations personnel, from North American Aviation supervisors and from the City Fire Department personnel indicate the aircraft, a jet, had an apparent flame-out at approximately 100 feet altitude. . . ."

Test Pilot Frank C. Smith testified:

" . . . I lost sight of it in the fog, and we were turning back into the lounge area, and we heard the engine stop with an explosion immediately, and we looked out to the area and saw the black smoke coming up through the fog." [R. 524.]

⁷Patrick H. Rogers testified:

"It was air-borne at the time I seen it, it was air-borne about 25 to 40 feet, and just—well, it hadn't even got to the end of the runway when there was a loud explosion and a big burst of flame, 25 to 40 feet off the runway." [R. 180.]

⁸Patrick H. Rogers testified:

"The Court: When you first saw this airplane, you saw a flash?

The Witness: Just a great big ball of fire.

The Court: It was in the fog then, was it?

The Witness: It was air-borne in the fog." [R. 181.]

Robert E. Callagy testified that when he first saw the plane it was air-borne and on fire. [R. 186-187.]

page 42, and shown to be inapplicable. Non-negligent pilot error is pure speculation without suggestion from the evidence. But the true color of the argument finally appears in the conclusion of the petition for rehearing, page 20, where appellant argues:

“ . . . the evidence is in such a state that it is just *as* probable that the crash was caused by negligence on the part of General Electric or negligence on the part of the deceased pilot as it was due to any negligent act or omission on the part of North American.”

This argument is precluded by the conceded presumption that the pilot acted with due care.

IV.

The Possibility of Negligence of General Electric as a Contributing Factor Is Precluded.

The supposed possibility of negligence of General Electric is a classical straw man. General Electric manufactured the motor and delivered it to appellant. It was not a sealed unit which could not be disassembled for inspection without destroying it.⁹ It could have been taken apart. Even if the engine was defective, the jury was warranted in concluding that appellant had not adequately inspected it. On the other hand, appellant put on experts to testify with convincing certainty that there was nothing wrong with the engine and this was uncontradicted.

Experts established that flame-outs are the result of fuel starvation, a condition which results from parts

⁹Hence it does not come within the rule established in *O'Rourke v. Day and Night Water Heater Co.* (1939), 31 Cal. App. 2d 364.

outside of the engine. In other words, flame-out results from parts manufactured and installed by appellant. Appellant's experts also testified that this doesn't happen on take-off except for mechanical failure.

Appellant has carefully avoided any recognition of those parts of the record quoted in the footnotes and in fact simply disregards everything that is unfavorable to appellant's interests. It bases its petition upon its own assertions, the record notwithstanding. This affords no common ground for argument of questions of law which it asserts are reason for rehearing and by the same token affords no ground for conflict between this court's opinion and the opinions of other courts.

V.

The Court's Decision in No Way Conflicts With Decisions of Any Jurisdiction on Cases Involving Manufacturer's Liability.

The argument on manufacturer's liability as stated in Appellant's Opening Brief, pages 26-28, in its Reply Brief, pages 16-22, and in the Petition for Rehearing, pages 6-11, is pretty well confused with other arguments of all sorts. It hardly seemed necessary to comment upon such cases as *McPherson v. Buick Motor Company* (1916), 217 N. Y. 382, 111 N. E. 1050, 65 C. J. S. 629, and other cases cited as following this doctrine.

The argument was fallaciously made originally and still is in the Petition for Rehearing. The principle is that if a manufactured article is the kind of article which will cause more than trivial harm if carelessly manufac-

tured, the manufacturer must use reasonable care in manufacturing it. The Supreme Court said that there must be knowledge of a danger not merely possible but probable.

This means that there must be knowledge that the article is the kind of thing which will be harmful if not carefully manufactured. Everybody knows that an airplane of any kind is such an article. Even appellant knows this.

Applying the law to this case, the question is whether appellant did exercise reasonable care in manufacturing the aircraft in question. This is a question of fact which the jury resolved against the appellant upon the evidence already noted.

This doctrine doesn't involve any question as to whether appellant knew or didn't know that there was anything wrong with the ill-fated aircraft. Appellees have heretofore avoided noticing this argument to save appellant the embarrassment of its mistake. It must by now have been knowingly made again and it should be sufficient to point out that it is a specious argument at best.

The court's reference to the evidence of fire is unquestionably correct. The testimony already quoted in footnote (2) above is hardly susceptible of any inference except that there was an *electrical fire* in the airplane before manufacture was complete. That nothing was done about it except to put out the fire and clean off the foamite leaving the defect is a fair inference.

Credit should be given for imagination in suggesting that this "*electrical fire*" was in reality a little fire of paper on the floor of the airplane and for salesmanship to conclude that this was the most probable explanation of the phenomena described by appellant's witness as an "*electrical fire* in the assembly." All of the honors for unrestrained speculation and conjecture should go to appellant. But to return to the reality of the record, the fire was an "*electrical fire in the assembly.*"

VI.

It Was Not Necessary for the Court to Mention the Doctrine of *Res Ipsa Loquitur*.

As pointed out in the brief of appellees, this case could rest upon the simple principles of circumstantial evidence or upon the doctrine of *res ipsa loquitur*. In view of the fact that the verdict can rest upon either principle, the appellate process is complete if the opinion sustains the case on one of them. Discussion of the other is unnecessary and not required.

There is no reason for the supposition that the court has applied the doctrine of *res ipsa loquitur* except that appellant refuses to consider the case from any other view point except the one which it mistakenly considers the most vulnerable. The fact that both parties discussed the doctrine in former briefs is of no consequence to the court in making its decision.

VII.

**The Court in Its Opinion and Appellees in Their Brief
Did Not Speculate on the Evidence.**

The limitations of appellees' tendered explanation of the tragedy are clearly stated by appellees in their brief, pages 19-21. It is there pointed out that this explanation is supported by the evidence and the reasonable inferences to be drawn therefrom. The only element of speculation involved is whether the jury reconstructed the event in the same way or came to some other equally tenable conclusion from the evidence. The court in its opinion clearly enough adopted the same approach.

It is well to bear in mind that the evidence on some important issues of fact was substantially conflicting. In such circumstances the Supreme Court has said:

"It is no answer to say that the jury's verdict involved speculation and conjecture." (that accident was impossible and must have been murder). "Whenever facts are in dispute or the evidence is such that fairminded men may draw different inferences, *a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inferences.* Only when there is a complete absence of probative fact to support the conclusion reached does a reviewable error appear. But when, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard as disbelief whatever facts are inconsistent with its conclusion, and the appellate court's function is exhausted when that evidentiary basis becomes appar-

ent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.” (Emphasis added.)

Lavender v. Kurn (1945), 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916, 923.

Conclusion.

From the evidence of “electrical fire in the assembly” of the plane, of the flame-out, the explosion in the air, the outbreak of fire in the air and the undeniably close connection between all of these, the jury was well within its established prerogative to find actionable negligence on the part of North American Aviation, Inc.

“The inference of negligence is not required to be an exclusive or compelling one. It is enough that the court cannot say that reasonable men could not draw it.”

Bauer v. Otis (1955), 133 Cal. App. 2d 439, 443, 284 P. 2d 133.

The petition for rehearing should be denied.

Respectfully submitted,

JAMES V. BREWER, and

ALBERT LEE STEPHENS, JR.,

By ALBERT LEE STEPHENS, JR.,

Attorneys for Appellees.



No. 15293

United States
Court of Appeals
for the Ninth Circuit

CEDAR CREEK OIL AND GAS COMPANY,
a corporation, INTERNATIONAL TRUST
COMPANY, a corporation, H. C. SMITH,
SUSAN M. WIGHT and W. B. HANEY,
Appellants,

vs.

FIDELITY GAS COMPANY, a corporation,
MONTANA-DAKOTA UTILITIES COM-
PANY, a corporation, and SHELL OIL
COMPANY, a corporation, Appellees.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 344, inclusive)

Appeal from the United States District Court
for the District of Montana
Billings Division

FILED

JAN-23 1957



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CEDAR CREEK OIL AND GAS COMPANY,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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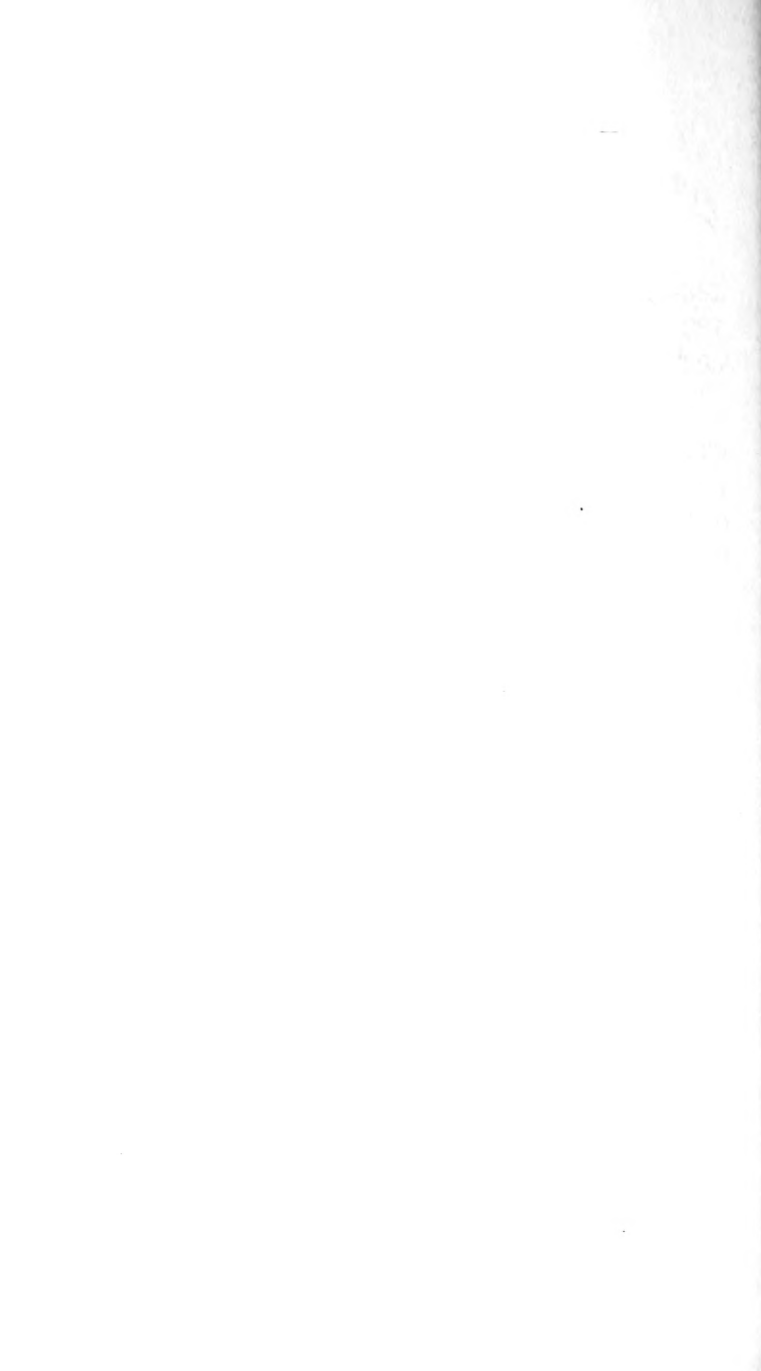
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NAME

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District of the State of Montana, in and for the County of Fallon, to the District Court of the United States, in and for the District of Montana, Billings Division. Petition for removal and bond on removal were filed in the District Court of the United States on February 25, 1953, true and correct copies of which are attached hereto.

Dated this 25th day of February, 1953.

COLEMAN, JAMESON & LAMEY

/s/ By COLE CROWLEY

A member of the firm,

Attorneys for Defendants

Of Counsel: Armin Johnson, Faegre & Benson,
Raymond Hildebrand.

[Endorsed]: Filed February 25, 1953.

[Title of District Court and Cause.]

PETITION FOR REMOVAL

Come now the defendants and for their petition for removal allege:

I.

That on or about February 2, 1953, plaintiffs commenced an action against these petitioning defendants by filing a complaint in the District Court of the Sixteenth Judicial District of the State of Montana in and for the County of Fallon; that plaintiff thereafter caused a copy of the alias summons and copy of the amended complaint to be served upon

each of the defendants; that a true and correct copy of the alias summons and amended complaint served upon petitioning defendants is attached hereto marked Exhibit 1 and is by this reference made a part hereof.

II.

That said cause of action is of a civil nature at law and the matter and amount in dispute exceeds the sum or value of \$3000.00, exclusive of interest and costs.

III.

That it appears from the face of the amended complaint attached hereto as Exhibit 1 that plaintiffs have joined in one complaint separate and independent claims or causes of action between plaintiffs who are citizens and residents of one state and defendants who are citizens and residents of other states; that the plaintiff, Mondakota Gas Company is a corporation duly organized, created and existing under and by virtue of the laws of the State of Nevada; that the defendants, Fidelity Gas Company, Montana Dakota Utilities Company, and Shell Oil Company, are corporations duly organized, created and existing under and by virtue of the laws of the State of Delaware; that the third and fourth causes of action of said amended complaint are separate and independent claims or causes of action solely between said plaintiff Mondakota Gas Company and said defendants; that the matter and amount in dispute involved in said third and fourth causes of action exceeds the sum or value of \$3000.00, exclusive of interest and costs. That the

plaintiff International Trust Company is a corporation duly organized, created and existing under and by virtue of the laws of the State of Colorado; that the fifth and sixth causes of action of said amended complaint are separate and independent claims or causes of action solely between said plaintiff International Trust Company and these petitioning defendants and the matter and amount in dispute involved in said fifth and six causes of action exceeds the sum or value of \$3000.00, exclusive of interest and costs. That the plaintiff Susan M. Wight is a citizen and resident of the State of Montana; that the seventh and eighth causes of action of said amended complaint are separate and independent claims or causes of action solely between said plaintiff Susan M. Wight and these petitioning defendants and the matter and amount in dispute in said seventh and eighth causes of action exceeds the sum or value of \$3000.00, exclusive of interest and costs. That the plaintiff H. C. Smith is a citizen and resident of the State of California; that the ninth and tenth causes of action of said amended complaint are separate and independent claims or causes of action solely between said plaintiff H. C. Smith and these petitioning defendants and the matter and amount in dispute involved in said ninth and tenth causes of action exceeds the sum or value of \$3000.00, exclusive of interest and costs. That the plaintiff, W. B. Haney is a citizen and resident of the State of California; that the eleventh and twelfth causes of action of said amended complaint are separate and independent claims or causes of

action solely between said plaintiff W. B. Haney and these petitioning defendants and the matter and amount in dispute involved in said eleventh and twelfth causes of action exceeds the sum or value of \$3000.00, exclusive of interest and costs.

IV.

That the second, fourth, sixth, eighth, tenth, and twelfth causes of action of said amended complaint involve claims or causes of action arising under the laws of the United States of America in that they constitute attempts on the part of the plaintiffs to abrogate and set aside unit agreements for the development of federal oil and gas leases and other contractual relationships with respect to said federal oil and gas leases, which said unit agreements have been and now are promulgated under and pursuant to the rules and regulations of the Secretary of the Interior of the United States of America and were before promulgation submitted to and approved by said Secretary of the Interior.

V.

That each and all of said twelve causes of action in the amended complaint involve claims or rights arising under the laws of the United States of America, and in particular under Title 30, U.S.C., Sections 181-194 and 221-236, in that they involve rights and interests in lands and minerals owned and leased by the United States of America, rights and interests in said lands and minerals as controlled and regulated by the Secretary of the Interior of

the United States of America under and pursuant to said federal statutes, and rights and interests in unit agreements and other contracts with respect to said lands and minerals prescribed by and approved by the said Secretary of Interior of the United States of America under the authority of said federal statutes and in particular under the authority of Title 30, U.S.C. Section 226e.

VI.

That this petition is made and filed herein within twenty days after service of summons upon the petitioning defendants; that your petitioning defendants desire to remove this amended complaint before the trial thereof from the said district court of the Sixteenth Judicial District of the State of Montana in and for the County of Fallon to the United States District Court in and for the District of Montana; that your petitioning defendants dispute the claims and demands of plaintiffs and deny the same and deny that the plaintiffs, or either of them, are entitled to any judgment or relief against the petitioning defendants prayed for in said amended complaint.

VII.

That petitioning defendants file and present herewith a good and sufficient bond with good and sufficient surety as provided and required by the statutes of the United States in such cases, conditioned that they will pay all costs that may be awarded by the District Court of the United States for the District of Montana to the plaintiff, or either of them,

if said District Court shall hold that the above entitled cause was wrongfully or improperly removed hereto.

Wherefore, petitioners pray that this honorable court accept this petition for removal and jurisdiction of this cause.

COLEMAN, JAMESON & LAMEY

/s/ By COLE CROWLEY

A member of the firm,

Attorneys for the defendants.

Of counsel for defendants Fidelity Gas Company and Montana Dakota Utilities Company: Armin Johnson, Faegre & Benson, Raymond Hildebrand.

Duly Verified.

In the District Court of the Sixteenth Judicial
District of the State of Montana, in and for
the County of Fallon

CEDAR CREEK OIL AND GAS COMPANY, a
corporation; INTERNATIONAL TRUST
COMPANY, a corporation; MONDAKOTA
GAS COMPANY, a corporation; H. C.
SMITH; SUSAN M. WIGHT; and W. B.
HANEY, Plaintiffs,

VS.

FIDELITY GAS COMPANY, a corporation;
MONTANA DAKOTA UTILITIES COM-
PANY, a corporation; and SHELL OIL COM-
PANY, a corporation, Defendants.

ALIAS SUMMONS

The State of Montana to the Above Named Defendants, Greetings:

You are hereby summoned to answer the complaint in this action, which is filed in the office of the Clerk of this Court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the plaintiff's attorney, within twenty (20) days after the service of this Summons, exclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the Complaint.

This is an action to quiet title of the plaintiffs in and to those certain lands and leases, situated in

Fallon County, State of Montana, and described as follows, to-wit:

Lease Number 025044-A covering the Southeast Quarter ($SE\frac{1}{4}$), South Half of the Northeast Quarter of the Southwest Quarter ($S\frac{1}{2} NE\frac{1}{4} SW\frac{1}{4}$), South Half of the Southwest Quarter ($S\frac{1}{2} SW\frac{1}{4}$) of Section Twenty-three (23); Northeast Quarter ($NE\frac{1}{4}$) of Section Thirty-five (35), all in Township Eight (8), North Range Fifty-nine (59), East Montana Meridian. Containing 420 Acres.

Lease Number 025044-B covering the North Half ($N\frac{1}{2}$), Northwest Quarter of the Southwest Quarter ($NW\frac{1}{4} SW\frac{1}{4}$), North Half of the Northeast Quarter of the Southwest Quarter ($N\frac{1}{2} NE\frac{1}{4} SW\frac{1}{4}$) of Section Twenty-three (23); North Half ($N\frac{1}{2}$), Southeast Quarter ($SE\frac{1}{4}$) of Section Twenty-four (24); North Half of the Northwest Quarter ($N\frac{1}{2} NW\frac{1}{4}$), Southeast Quarter of the Northwest Quarter ($SE\frac{1}{4} NW\frac{1}{4}$), North Half of the Southeast Quarter ($N\frac{1}{2} SE\frac{1}{4}$), Southeast Quarter of the Southeast Quarter ($SE\frac{1}{4} SE\frac{1}{4}$), of Section Twenty-five (25); Northeast Quarter of the Northwest Quarter ($NE\frac{1}{4} NW\frac{1}{4}$) of Section Thirty-five (35), all in Township Eight (8), North Range Fifty-nine (59), East Montana Principal Meridian. Containing 1,140 Acres.

Fee Lease, Lots Three (3) and Four (4), South Half of the Northwest Quarter ($S\frac{1}{2} NW\frac{1}{4}$), Southwest Quarter ($SW\frac{1}{4}$) of Section Two (2), in Township Eight (8), North Range Fifty-nine (59) East Montana Principal Meridian. Containing 271.45 Acres.

Fee Lease, West Half ($W\frac{1}{2}$) of Section Twelve (12), Township Eight (8), North Range Fifty-nine (59), East Montana Principal Meridian. Containing 320 Acres.

Lease Number 025001 covering the Northeast Quarter ($NE\frac{1}{4}$) of Section Twenty-five (25), Township Eight (8) North, Range Fifty-nine (59), East Montana Principal Meridian.

Lease Number 029521 covering the South Half ($S\frac{1}{2}$) of Section Five (5), and the Northeast Quarter of the Northwest Quarter ($NE\frac{1}{4}$ $NW\frac{1}{4}$), the Northeast Quarter ($NE\frac{1}{4}$), the Northeast Quarter of the Southeast Quarter ($NE\frac{1}{4}$ $SE\frac{1}{4}$) of Section Twenty-seven (27), Township Eight (8), North of Range Fifty-nine (59), East of the Montana Principal Meridian.

Federal Leases 038815, 021056-A 021056-B covering the North Half of the North Half ($N\frac{1}{2}$ $N\frac{1}{2}$) of Section Ten (10), Township Eight (8), North of Range Fifty-nine (59), East of the Montana Principal Meridian; the Southeast Quarter ($SE\frac{1}{4}$) and the South Half of the Northeast Quarter ($S\frac{1}{2}$ $NE\frac{1}{4}$) and the East Half of the Southeast Quarter ($E\frac{1}{2}$ $SE\frac{1}{4}$) of Section Twelve (12), Township Eight (8), North of Range Fifty-nine (59), East of the Montana Principal Meridian.

Government Leases 026954-A, 026954-B covering Lots One, Two, Three, Four (1, 2, 3, 4), and the East Half of the Northwest Quarter ($E\frac{1}{2}$ $NW\frac{1}{4}$), and the East Half of the Southwest Quarter ($E\frac{1}{2}$ $SW\frac{1}{4}$) of Section Thirty (30), Township Eight (8),

North of Range Sixty (60), East of the Montana Principal Meridian.

The Southeast Quarter ($SE\frac{1}{4}$) of Section Eighteen (18), Township Eight (8) North of Range Sixty (60), East of the Montana Principal Meridian.

Government Lease Number 029750-A and 029750-B covering Lots One, Two, Three, Four (1, 2, 3, 4), South Half of the North Half ($S\frac{1}{2}$ $N\frac{1}{2}$), Section Four (4), Township Eight (8), North Range Fifty-nine (59), East of the Montana Principal Meridian.

213/360ths interest in Government Lease Number 034165 covering the Northwest Quarter of the Southeast Quarter ($NW\frac{1}{4}$ $SE\frac{1}{4}$) of Section Eight (8), and Lot One (1), and the Southeast Quarter of the Northeast Quarter ($SE\frac{1}{4}$ $NE\frac{1}{4}$) of Section Six (6), all in Township Eight (8), North of Range Fifty-nine (59), East of the Montana Principal Meridian.

213/360ths interest in Government Lease Number 034166 covering Lots One and Two (1, 2), South Half of the Northeast Quarter ($S\frac{1}{2}$ $NE\frac{1}{4}$), and the Southeast Quarter ($SE\frac{1}{4}$) of Section Two (2), Township Eight (8), North of Range Fifty-nine (59), East of the Montana Principal Meridian.

Government Lease Number 038253 covering the Southeast Quarter ($SE\frac{1}{4}$) of Section Thirteen (13), Township Eight (8), North Range Fifty-nine (59), East of the Montana Principal Meridian.

Government Lease 037591 covering the West Half of the Northwest Quarter ($W\frac{1}{2}$ $NW\frac{1}{4}$), and the Southwest Quarter ($SW\frac{1}{4}$) of Section Thirteen

(13), Township Eight (8), North Range Fifty-nine (59), East of the Montana Principal Meridian.

63/360ths interest in Government Lease Number 034165 covering the Northwest Quarter of the Southeast Quarter (NW $\frac{1}{4}$ SE $\frac{1}{4}$) of Section Eight (8), and Lot One (1) and the Southeast Quarter of the Northeast Quarter (SE $\frac{1}{4}$ NE $\frac{1}{4}$) of Section Six (6), all in Township Eight (8), North of Range Fifty-nine (59), East of the Montana Principal Meridian.

63/360ths interest in Government Lease Number 034166 covering Lots One and Two (1, 2), and the South Half of the Northeast Quarter (S $\frac{1}{2}$ NE $\frac{1}{4}$), and the Southeast Quarter (SE $\frac{1}{4}$) of Section Two (2), Township Eight (8), North of Range Fifty-nine (59), East of the Montana Principal Meridian.

and for plaintiff's costs of suit.

Witness my hand and the seal of this Court this 2nd day of February, 1953.

W. L. RIDDLE
Clerk

[Title of District Court of the 16th Judicial District and Cause.]

AMENDED COMPLAINT

Come now the plaintiffs, and for cause of action allege as follows:

First Cause of Action

I.

That the plaintiff, Cedar Creek Oil and Gas Com-

pany, a corporation, is a corporation duly organized, created, and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana;

II.

That the defendant, Fidelity Gas Company, a corporation, is a corporation duly organized, created, and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana, and that said defendant, Fidelity Gas Company, a corporation, is wholly owned by the defendant, Montana Dakota Utilities Company, a corporation; that defendant, Montana Dakota Utilities Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the Laws of the State of Delaware, and is duly qualified to do business within the State of Montana;

III.

That the defendant, Shell Oil Company, a corporation, is a corporation duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana.

IV.

That the defendants, Fidelity Gas Company, a corporation, and Montana Dakota Utilities Company, a corporation are the common lessees of all of the plaintiffs herein within the provisions of Section 93-2813, Revised Codes of Montana, 1947.

That the defendant, Shell Oil Company, a corporation, claims some interest in and to the lands and leases hereinafter described by, through and under the said lessees, the exact nature of the interest claimed by the defendant, Shell Oil Company, a corporation, being to the plaintiff Cedar Creek Oil and Gas Company, unknown.

V.

That the plaintiff, Cedar Creek Oil and Gas Company, a corporation, is the holder of government permits and leases on and in the possession and entitled to the possession of lands situated in Fallon County, Montana, which are described as follows, to-wit:

Lease Number 025044-A covering the Southeast Quarter ($SE\frac{1}{4}$), South Half of the Northeast Quarter of the Southwest Quarter ($S\frac{1}{2}$ $NE\frac{1}{4}$ $SW\frac{1}{4}$), South Half of the Southwest Quarter ($S\frac{1}{2}$ $SW\frac{1}{4}$) of Section Twenty-three (23); Northeast Quarter ($NE\frac{1}{4}$) of Section Thirty-five (35), all in Township Eight (8) North Range Fifty-nine (59) East Montana Meridian. Containing 420 Acres.

Lease Number 025044-B covering the North Half ($N\frac{1}{2}$), Northwest Quarter of the Southwest Quarter ($NW\frac{1}{4}$ $SW\frac{1}{4}$), North Half of the Northeast Quarter of the Southwest Quarter ($N\frac{1}{2}$ $NE\frac{1}{4}$ $SW\frac{1}{4}$) of Section Twenty-three (23); North Half ($N\frac{1}{2}$), Southeast Quarter ($SE\frac{1}{4}$) of Section Twenty-four; North Half of the Northwest ($N\frac{1}{2}$ $NW\frac{1}{4}$), Southeast Quarter of the Northwest Quarter ($SE\frac{1}{4}$ $NW\frac{1}{4}$), North Half of the Southeast Quarter ($N\frac{1}{2}$

SE $\frac{1}{4}$), Southeast Quarter of the Southeast Quarter (SE $\frac{1}{4}$ SE $\frac{1}{4}$) of Section Twenty-five (25); Northeast Quarter of the Northwest Quarter (NE $\frac{1}{4}$ NW $\frac{1}{4}$) of Section Thirty-five (35), all in Township Eight (8) North Range Fifty-nine (59), East Montana Principal Meridian. Containing 1,140 Acres.

VI.

That the plaintiff, Cedar Creek Oil and Gas Company, a corporation, is the owner, in the possession, and entitled to the possession of the lands situated in Fallon County, Montana, which are described as follows, to-wit:

Fee Lease, Lots Three (3) and Four (4), South Half of the Northwest Quarter (S $\frac{1}{2}$ NW $\frac{1}{4}$), Southwest Quarter (SW $\frac{1}{4}$) of Section Two (2) in Township Eight (8) North, Range Fifty-nine (59) East, Montana Principal Meridian. Containing 271.45 Acres.

Fee Lease, West Half (W $\frac{1}{2}$) of Section Twelve (12), Township Eight (8) North, Range Fifty-nine (59) East, Montana Principal Meridian. Containing 320 Acres.

VII.

That the defendants claim some right against the lands and leases of the plaintiff, Cedar Creek Oil and Gas Company, a corporation, described above, under and by reason of a lease and operating agreement bearing date of the 7th day of February, 1935 and signed on the 11th day of February, 1935, wherein the plaintiff, Cedar Creek Oil and Gas Company, a corporation, is the party of the first

Quarter of the Southwest Quarter ($N\frac{1}{2}$ $NE\frac{1}{4}$ $SW\frac{1}{4}$) of Section Twenty-three (23); North Half ($N\frac{1}{2}$), Southeast Quarter ($SE\frac{1}{4}$) of Section Twenty-four (24); North Half of the Northwest Quarter ($N\frac{1}{2}$ $NW\frac{1}{4}$), Southeast Quarter of the Northwest Quarter ($SE\frac{1}{4}$ $NW\frac{1}{4}$), North Half of the Southeast Quarter ($N\frac{1}{2}$ $SE\frac{1}{4}$), Southeast Quarter of the Southeast Quarter ($SE\frac{1}{4}$ $SE\frac{1}{4}$) of Section Twenty-five (25); Northeast Quarter of the Northwest Quarter ($NE\frac{1}{4}$ $NW\frac{1}{4}$) of Section Thirty-five (35), all in Township Eight (8) North Range Fifty-nine (59), East Montana Principal Meridian. Containing 1,140 Acres.

VI.

That the plaintiff, Cedar Creek Oil and Gas Company, a corporation, is the owner, in the possession, and entitled to the possession of the lands situated in Fallon County, Montana, which are described as follows, to-wit:

Fee Lease, Lots Three (3) and Four (4), South Half of the Northwest Quarter ($S\frac{1}{2}$ $NW\frac{1}{4}$), Southwest Quarter ($SW\frac{1}{4}$) of Section Two (2) in Township Eight (8), North Range Fifty-nine (59) East, Montana Principal Meridian. Containing 271.45 Acres.

Fee Lease, West Half ($W\frac{1}{2}$) of Section Twelve (12), Township Eight (8) North Range Fifty-nine (59), East Montana Principal Meridian. Containing 320 Acres.

VII.

That the defendants and each of them claim some interest of, in and to the premises described in

Paragraphs V and VI hereof, leased or owned by the plaintiff, Cedar Creek Oil and Gas Company, a corporation, by reason of a certain instrument that is entitled, "Cooperative or Unit Plan of Development, Unit Number 5, Cedar Creek Anticline, Fallon County, Montana," said instrument being executed on or about the 11th day of February, 1935, that the parties to the said instrument were the plaintiffs Cedar Creek Oil and Gas Company, a corporation, and the Gas Development Company, a corporation. That the defendants, Fidelity Gas Company, a corporation, are the assignees and successors in interest of the Gas Development Company, a corporation, in and to said instrument. That defendants claim some right in and to the sands and strata underlying the surface of the land above described by reasons of said instrument and to prospect for and remove oil from said premises, but the claims and interests therein of the defendants, and each of them in and to the said premises and the sands and strata underlying them are without any right, title, or interest whatsoever, and are adverse to and constitute a cloud upon plaintiffs title to the said premises.

Third Cause of Action

I.

That the plaintiff, Mondakota Gas Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Nevada, and is duly qualified to do business within the State of Montana.

II.

That the defendant, Fidelity Gas Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana, and that said defendant, Fidelity Gas Company, a corporation, is wholly owned by the defendant, Montana Dakota Utilities Company, a corporation; that defendant, Montana Dakota Utilities Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana.

III.

That the defendant, Shell Oil Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana.

IV.

That the defendants, Fidelity Gas Company, a corporation, and Montana Dakota Utilities Company, a corporation, are the common lessees of all of the plaintiffs herein within the provisions of Section 93-2813, Revised Codes of Montana, 1947. That the defendant, Shell Oil Company, a corporation, claims some interest in and to the lands and leases hereinafter described by, through and under the said lessees, the exact nature of the interest

claimed by the defendant, Shell Oil Company, a corporation, being to the plaintiff, Mondakota Gas Company unknown.

VI.

That the plaintiff, Mondakota Gas Company, a corporation, is the holder of Government permits and leases on and in the possession and entitled to the possession of lands situated in Fallon County, Montana which are described as follows, to-wit:

Lease Number 025001, covering the Northeast Quarter (NE $\frac{1}{4}$) of Section Twenty-five (25), Township Eight (8), North, Range Fifty-nine (59) East, Montana Principal Meridian.

VI.

That the defendants claim some right against the land and the leases of the plaintiff described above under and by reason of a lease and operating agreement bearing date June 24, 1934, wherein one L. M. Walker is the party of the first part and the defendant, Fidelity Gas Company, a corporation, is the party of the second part, and which said lease and operating agreement describes the land above set forth. That the plaintiff, Mondakota Gas Company, is the assignee of the said L. M. Walker in and to said lease and operating agreement, that said claims and interests to the lands and leases of the plaintiff, Mondakota Gas Company, a corporation, above described by the said defendant and each of them, in and to said premises are without any right, title, or interest whatsoever, and are adverse to and constitute a cloud upon plaintiffs title to said premises.

Fourth Cause of Action

I.

That the plaintiff, Mondakota Gas Company, a corporation, is a corporation duly organized, created, and existing under and by virtue of the laws of the State of Nevada, and is duly qualified to do business within the State of Montana.

II.

That the defendant, Fidelity Gas Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana, and that said defendant, Fidelity Gas Company, a corporation, is wholly owned by the defendant, Montana Dakota Utilities Company, a corporation; that defendant, Montana Dakota Utilities Company, a corporation is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana.

III.

That the defendant, Shell Oil Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana.

IV.

That the defendants, Fidelity Gas Company, a corporation, and Montana Dakota Utilities Com-

pany, a corporation, are the common lessees of all of the plaintiffs herein within the provisions of Section 93-2813, Revised Codes of Montana, 1947. That the defendant, Shell Oil Company, a corporation, claims some interest in and to the lands and leases hereinafter described by, through and under the said lessees, the exact nature of the interest claimed by the defendant, Shell Oil Company, a corporation, being to the plaintiff, Cedar Creek Oil and Gas Company unknown.

V.

That the plaintiff, Mondakota Gas Company, a corporation, is the holder of Government permits and leases on and in the possession and entitled to the possession of lands situated in Fallon County, Montana which are described as follows, to-wit:

Lease Number 025001 covering the Northeast Quarter (NE $\frac{1}{4}$) of Section Twenty-five (25), Township Eight (8) North, Range Fifty-nine (59) East, Montana Principal Meridian.

VI.

That the defendants, and each of them claim some interest in and to the premises described in Paragraph V hereof, leased by the plaintiff, Mondakota Gas Company, by reason of a certain instrument that is entitled, "Cooperative or Unit Plan of Development, Unit Number 5, Cedar Creek Anticline, Fallon County, Montana." Said agreement being executed on or about the 11th day of February, 1935. That the parties to the said instrument were

L. M. Walker and the Gas Development Company, a corporation. That the defendants, Fidelity Gas Company, a corporation, and Montana Dakota Utilities Company, a corporation, are the assignees and successors in interest of the Gas Development Company, a corporation, in and to said instrument. That defendants claim some right in and to the sands and strata underlying the surface of the land above described, and some right to prospect for and recover oil from said lands by reason of said instrument, but the claims and interests therein of the defendants, and each of them in and to the said premises and the sands and strata underlying them are without any right, title or interest whatsoever, and are adverse to and constitute a cloud upon plaintiffs title to the said premises.

Fifth Cause of Action

I.

That the plaintiff, International Trust Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Colorado.

II.

That the defendant, Fidelity Gas Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana, and that said defendant, Fidelity Gas Company, a corporation, is wholly owned by the defendant, Montana

Dakota Utilities Company, a corporation; that defendant, Montana Dakota Utilities Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana.

III.

That the defendant, Shell Oil Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana.

IV.

That the defendants, Fidelity Gas Company, a corporation, and Montana Dakota Utilities Company, a corporation are the common lessees of all of the plaintiffs herein within the provisions of Section 93-2813, Revised Codes of Montana, 1947. That the defendant, Shell Oil Company, a corporation, claims some interest in and to the lands and leases hereinafter described by, through and under the said lessees, the exact nature of the interest claimed by the defendant, Shell Oil Company, a corporation, being to the plaintiff Cedar Creek Oil and Gas Company, unknown.

V.

That the plaintiff, International Trust Company, a corporation, is the holder of government permits and leases on and in the possession, and entitled to

the possession of lands situated in Fallon County, Montana, which are described as follows, to-wit:

Lease Number 029521 covering the South Half ($S\frac{1}{2}$) of Section Five (5), and the Northeast Quarter of the Northwest Quarter ($NE\frac{1}{4}$ $NW\frac{1}{4}$), the Northeast Quarter ($NE\frac{1}{4}$), the Northeast Quarter of the Southeast Quarter ($NE\frac{1}{4}$ $SE\frac{1}{4}$) of Section Twenty-seven (27), Township Eight (8) North of Range Fifty-nine (59) East of the Montana Principal Meridian.

VI.

That the defendants claim some right against the lands and the leases of the plaintiff, International Trust Company, a corporation described in Paragraph V above, under and by reason of a lease and operating agreement bearing date of the 29th day of June, 1934, wherein one Clarence W. Carter is the party of the first part, and the defendant, Fidelity Gas Company, a corporation, is the party of the second part, and which said lease and operating agreement describes the land above set forth. That the plaintiff, International Trust Company, a corporation, is the assignee of the said Clarence W. Carter in and to said lease and operating agreement, that said claims and interests to the lands and leases of the plaintiff, International Trust Company, a corporation, above described by the defendants and each of them in and to said premises are without any right, title or interest whatsoever, and are adverse to and constitute a cloud upon said plaintiffs' title to said premises.

Sixth Cause of Action

I.

That the plaintiff, International Trust Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Colorado.

II.

That the defendant, Fidelity Gas Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana, and that said defendant, Fidelity Gas Company, a corporation, is wholly owned by the defendant, Montana Dakota Utilities Company, a corporation, that defendant, Montana Dakota Utilities Company, a corporation, is a corporation duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana.

III.

That the defendants, Fidelity Gas Company, a corporation, and Montana Dakota Utilities Company, a corporation, are the common lessees of all of the plaintiffs herein within the provisions of Section 93-2813, Revised Codes of Montana, 1947. That the defendant, Shell Oil Company, a corporation, claims some interest in and to the lands and leases hereinafter described by, through and under the said lessees, the exact nature of the interest

claimed by the defendant, Shell Oil Company, a corporation, being to the plaintiff, Cedar Creek Oil and Gas Company unknown.

IV.

That the defendant, Shell Oil Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana.

V.

That the plaintiff, International Trust Company, a corporation, is the holder of government permits and leases on and in the possession and entitled to the possession of lands situated in Fallon County, Montana, which are described as follows, to-wit:

Lease Number 029521 covering the South Half ($S\frac{1}{2}$) of Section Five (5), and the Northeast Quarter of the Northwest Quarter ($NE\frac{1}{4}$ $NW\frac{1}{4}$), the Northeast Quarter ($NE\frac{1}{4}$), the Northeast Quarter of the Southeast Quarter ($NE\frac{1}{4}$ $SE\frac{1}{4}$) of Section Twenty-seven (27), Township Eight (8), North of Range Fifty-nine (59), East of the Montana Principal Meridian.

VI.

That the defendants, and each of them claim some interest of, in and to the premises described in Paragraph IV hereof, by reason of a certain instrument that is entitled, "Cooperative or Unit Plan of Development, Unit Number 5, Cedar Creek Anticline, Fallon County, Montana," said instru-

ment being executed on the 11th day of February, 1935. That the parties to the said instrument were Clarence W. Carter and the Gas Development Company, a corporation. The the defendants, Fidelity Gas Company, a corporation, and Montana Dakota Utilities Company, a corporation, are the assignees and successors in interest of the said Gas Development Company, a corporation in and to said instrument. That the plaintiff, International Trust Company, a corporation, is the assignee and successor in interest to Clarence W. Carter under the said instrument. That the defendants claim some right in and to the strata underlying the surface of the land above described by reason of said instrument, and the right to prospect for and remove oil from said premises, but the claims and interests therein of the defendants, and each of them, in and to the said premises, and the sands and strata underlying them are without any right, title, or interest whatsoever, and are adverse to and constitute a cloud upon plaintiffs' title to the said premises.

Seventh Cause of Action

I.

That the defendant, Fidelity Gas Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana, and that said defendant, Fidelity Gas Company, a corporation, is wholly owned by the defendant, Montana Dakota Utilities Company, a corporation; that de-

fendant, Montana Dakota Utilities Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the state of Montana.

II.

That the defendant, Shell Oil Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana.

III.

That the defendants, Fidelity Gas Company, a corporation, and Montana Dakota Utilities Company, a corporation, are the common lessees of all of the plaintiffs herein within the provisions of Section 93-2813, Revised Codes of Montana, 1947. That the defendant, Shell Oil Company, a corporation, claims some interest in and to the lands and leases hereinafter described by, through and under the said lessees, the exact nature of the interest claimed by the defendant, Shell Oil Company, a corporation, being to the plaintiff, Susan M. Wight unknown.

IV.

That the plaintiff, Susan M. Wight is the holder of Government leases and in the possession and entitled to the possession of the lands situated in Fallon County, Montana which are described as follows, to-wit:

Federal Leases 038815, 021056-A, 021056-B covering the North Half of the North Half ($N\frac{1}{2}$ $N\frac{1}{2}$) of Section Ten (10) Township Eight (8), North of Range Fifty-nine (59), East of the Montana Principal Meridian. The Southeast Quarter ($SE\frac{1}{4}$) and the South Half of the Northeast Quarter ($S\frac{1}{2}$ $NE\frac{1}{4}$) and the East Half of the Southeast Quarter ($E\frac{1}{2}$ $SE\frac{1}{4}$) of Section Twelve (12), Township Eight (8) North of Range Fifty-nine (59), East of the Montana Principal Meridian.

Government Leases 026954-A, 026954-B covering Lots One, Two, Three, Four (1, 2, 3, 4), the East Half of the Northwest Quarter ($E\frac{1}{2}$ $NW\frac{1}{4}$), and the East Half of the Southwest Quarter ($E\frac{1}{2}$ $SW\frac{1}{4}$) of Section Thirty (30), Township Eight (8), North of Range Sixty (60), East of the Montana Principal Meridian.

V.

That the plaintiff, Susan M. Wight is the owner of, and in the possession, and entitled to the possession of the following land situated in Fallon County, Montana which are described as follows, to-wit:

The Southeast Quarter ($SE\frac{1}{4}$) of Section Eighteen (18), Township Eight North (8) of Range Sixty (60), East of the Montana Principal Meridian.

VI.

That the defendants claim some right against the lands and leases of the plaintiff, Susan M. Wight, described in Paragraphs IV and V above, under

and by reason of a lease and operating agreement made and executed on or about the 1st day of June, 1934, wherein one George Norbeck is the party of the first part, and the defendant, Fidelity Gas Company, a corporation, is the party of the second part, and which said lease and operating agreement describes the land above set forth, but said claims and interests therein of the defendant, and each of them in and to said premises are without any right, title or interest whatsoever, and are adverse to and constitute a cloud upon said plaintiffs title to said premises.

Eighth Cause of Action

I.

That the defendant, Fidelity Gas Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana, and that said defendant, Fidelity Gas Company, a corporation, is wholly owned by the defendant, Montana Dakota Utilities Company, a corporation; that defendant, Montana Dakota Utilities Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana.

II.

That the defendant, Shell Oil Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the

State of Delaware, and is duly qualified to do business within the State of Montana.

III.

That the defendants, Fidelity Gas Company, a corporation, and Montana Dakota Utilities Company, a corporation are the common lessees of all of the plaintiffs herein within the provisions of Section 93-2813, Revised Codes of Montana, 1947. That the defendant, Shell Oil Company, a corporation, claims some interest in and to the lands and leases hereinafter described by, through and under the said lessees, the exact nature of the interest claimed by the defendant, Shell Oil Company, a corporation, being to the plaintiff, Susan M. Wight, unknown.

IV.

That the plaintiff, Susan M. Wight is the holder of Government leases and in the possession, and entitled to the possession of the lands situated in Fallon County, Montana which are described as follows, to-wit:

Federal Leases 038815, 021056-A, 021056-B covering the North Half of the North Half ($N\frac{1}{2}$ $N\frac{1}{2}$) of Section Ten (10), Township Eight (8), North of Range Fifty-nine (59), East of the Montana Principal Meridian, the Southeast Quarter ($SE\frac{1}{4}$) and the South Half of the Northeast Quarter ($S\frac{1}{2}$ $NE\frac{1}{4}$) and the East Half of the Southeast Quarter ($E\frac{1}{2}$ $SE\frac{1}{4}$) of Section Twelve (12), Township Eight (8), North of Range Fifty-nine (59), East of the Montana Principal Meridian.

Government Leases 026954-A, 026954-B covering Lots One, Two, Three, Four (1, 2, 3, 4) the East Half of the Northwest Quarter ($E\frac{1}{2}$ NW $\frac{1}{4}$) and the East Half of the Southwest Quarter ($E\frac{1}{2}$ SW $\frac{1}{4}$) of Section Thirty (30), Township Eight (8), North of Range Sixty (60), East of the Montana Principal Meridian.

V.

That the plaintiff, Susan M. Wight is the owner of, and in the possession, and entitled to the possession of the following land situated in Fallon County, Montana which are described as follows, to-wit:

The Southeast Quarter ($SE\frac{1}{4}$) of Section Eighteen (18), Township Eight (8), North of Range Sixty (60) East of the Montana Principal Meridian.

VI.

That the defendants *in each of them* claim some interest of, in and to the premises described in Paragraphs IV and V above by reason of a certain instrument that is entitled, "Cooperative or Unit Plan of Development, Unit Number 5, Cedar Creek Anticline, Fallon County, Montana", said instrument being executed or or about the 7th day of February, 1935. That the parties to the said instrument were one George Norbeck and the Gas Development Company, a corporation. That the defendants, Fidelity Gas Company, a corporation, and Montana Dakota Utilities Company, a corporation, are the assignees and successors in interest of the Gas Development Company, a corporation, in and

to the said instrument. That the defendants claim some right in and to the sands and strata underlying the surface of the land above described by reason of said instrument, and the right to prospect for and remove oil from said premises. That the claims and interests therein of the defendant, and each of them and to said premises and the sands and strata underlying them are without any right, title, or interest whatsoever, and are adverse to and constitute a cloud upon said plaintiffs' title to said premises.

Ninth Cause of Action

I.

That the defendant, Fidelity Gas Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana, and that said defendant, Fidelity Gas Company, a corporation, is wholly owned by the defendant, Montana Dakota Utilities Company, a corporation; that defendant, Montana Dakota Utilities Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana.

II.

That the defendant, Shell Oil Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana.

III.

That the defendants, Fidelity Gas Company, a corporation, and Montana Dakota Utilities Company, a corporation are the common lessees of all of the plaintiffs herein within the provisions of Section 93-2813, Revised Codes of Montana, 1947. That the defendant, Shell Oil Company, a corporation, claims some interest in and to the lands and leases hereinafter described by, through and under the said lessees, the exact nature of the interest claimed by the defendant, Shell Oil Company, a corporation, being to the plaintiff, H. C. Smith unknown.

IV.

That the plaintiff, H. C. Smith is the holder of Government Leases and in the possession, and entitled to the possession of the lands situated in Fallon County, Montana which are described as follows, to-wit:

Government Lease Number 029750-A and 029750-B covering Lots One, Two, Three, Four (1, 2, 3, 4), South Half of the North Half (S $\frac{1}{2}$ N $\frac{1}{2}$), Section Four (4), Township Eight (8) North Range Fifty-nine (59), East of the Montana Principal Meridian.

213/360ths interest in Government Lease Number 034165 covering the Northwest Quarter of the Southeast Quarter (NW $\frac{1}{4}$ SE $\frac{1}{4}$) of Section Eight (8), and Lot One (1) and the Southeast Quarter of the Northeast Quarter (SE $\frac{1}{4}$ NE $\frac{1}{4}$) of Section Six (6), all in Township Eight (8), North of Range

Fifty-nine (59), East of the Montana Principal Meridian.

213/360th interest in Government Lease Number 034166 covering Lots One and Two (1, 2), South Half of the Northeast Quarter ($S\frac{1}{2} NE\frac{1}{4}$) and the Southeast Quarter ($SE\frac{1}{4}$) of Section Two (2), Township Eight (8), North of Range Fifty-nine (59), East of the Montana Principal Meridian.

Government Lease Number 038253 covering Southeast Quarter ($SE\frac{1}{4}$) of Section Thirteen (13), Township Eight (8), North Range Fifty-nine (59), East of the Montana Principal Meridian.

V.

That the defendants claim some right against the lands and leases of the plaintiff, H. C. Smith described above as Government Leases 029750-A and 029750-B, covering Lots One, Two, Three, Four (1, 2, 3, 4) and the South Half of the North Half ($S\frac{1}{2} N\frac{1}{2}$) of Section four (4), Township Eight (8), North Range Fifty-nine (59), East of the Montana Principal Meridian, under and by reason of a lease and operating agreement bearing the date of the 12th day of June, 1934, wherein one John Wight is the party of the first part, and defendant, Fidelity Gas Company, a corporation, is the party of the second part, and which said lease and operating agreement describes the land above set forth, but said claims and interests therein of the defendants, and each of them in and to said premises are without any right, title, or interest whatsoever, and are adverse to and constitute a cloud upon said plaintiffs' title to said premises.

That the defendants claim some right against the land and the leases of the plaintiff, H. C. Smith, described above as Government Lease 034165 and 034166 covering the Northwest Quarter of the Southeast Quarter ($NW\frac{1}{4} SE\frac{1}{4}$) of Section Eight (8), Lot One (1), and the Southeast Quarter of the Northeast Quarter ($SE\frac{1}{4} NE\frac{1}{4}$) of Section Six (6) all in Township Eight (8) North of Range Fifty-nine (59), East of Montana Principal Meridian, and Lots One and Two (1, 2), the South Half of the Northeast Quarter ($S\frac{1}{2} NE\frac{1}{4}$), and the Southeast Quarter ($SE\frac{1}{4}$) of Section Two (2), in Township Eight (8), North of Range Fifty-nine (59) East, under and by reason of a lease and operating agreement made and executed on or about the 22nd day of February, 1935, wherein C. M. Adams is the party of the first part, and the defendant, Fidelity Gas Company, a corporation, is the party of the second part, and which said lease and operating agreement describes the land above set forth, but said claims and interests therein of the defendant, and each of them in and to said premises are without any right, title or interest whatsoever, and are adverse to and constitute a cloud upon said plaintiffs title to said premises.

That the defendants claim some right against the land and leases of the plaintiffs H. C. Smith described above as Government Leases 038253 covering the Southeast Quarter ($SE\frac{1}{4}$) of Section Thirteen (13), Township Eight (8) North of Range Fifty-nine (59), East of the Montana Principal Meridian, under and by reason of a lease and oper-

ating agreement made and executed on or about the 16th day of May, 1934, wherein one George Norbeck is the party of the first part and the defendant, Fidelity Gas Company, a corporation, is the party of the second part, and which said lease and operating agreement describes the land above set forth. That said claims and interests therein of the defendant, and each of them in and to said premises are without any right, title or interest whatsoever, and are adverse to and constitute a cloud upon said plaintiffs' title to said premises.

Tenth Cause of Action

I.

That the defendant, Fidelity Gas Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana, and that said defendant, Fidelity Gas Company, a corporation, is wholly owned by the defendant, Montana Dakota Utilities Company, a corporation; that defendant, Montana Dakota Utilities Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana.

II.

That the defendant, Shell Oil Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the

State of Delaware, and is duly qualified to do business within the State of Montana.

III.

That the defendants, Fidelity Gas Company, a corporation, and Montana Dakota Utilities Company, a corporation are the common lessees of all of the plaintiffs herein within the provisions of Section 93-2813, Revised Codes of Montana, 1947. That the defendant, Shell Oil Company, a corporation, claims some interest in and to the lands and leases hereinafter described by, through and under the said lessees, the exact nature of the interest claimed by the defendant, Shell Oil Company, a corporation, being to the plaintiff, Cedar Creek Oil and Gas Company, unknown.

IV.

That the plaintiff, H. C. Smith is the holder of Government Leases and in the possession and entitled to the possession of the lands situated in Fallon County, Montana which are described as follows, to-wit:

Government Lease Number 029750-A and 029750-B covering Lots One, Two, Three, Four (1, 2, 3, 4), South Half of the North Half ($S\frac{1}{2}N\frac{1}{2}$), Section Four (4), Township Eight (8), North Range Fifty-nine (59), East of the Montana Principal Meridian.

213/360th interest in Government Lease Number 034165 covering the Northwest Quarter of the Southeast Quarter ($NW\frac{1}{4}SE\frac{1}{4}$) of Section Eight (8), and Lot One (1) and the Southeast Quarter of

the Northeast Quarter ($SE\frac{1}{4}NE\frac{1}{4}$) of Section Two (2), all in Township Eight (8), North of Range Fifty-nine (59), East of Montana Principal Meridian.

213/360th interest in Government Lease Number 034166 covering Lots One and Two (1, 2), South Half of the Northeast Quarter ($S\frac{1}{2}NE\frac{1}{4}$) and the Southeast Quarter ($SE\frac{1}{4}$) of Section Six (6), all in Township Eight (8), North of Range Fifty-nine (59), East of Montana Principal Meridian.

Government Lease Number 038253 covering the Southeast Quarter ($SE\frac{1}{4}$) of Section Thirteen (13), Township Eight (8), North Range Fifty-nine (59) East of the Montana Principal Meridian.

V.

That the defendants, and each of them claim some interest in and to the lands and leases of the plaintiff, H. C. Smith, described heretofore as Government Lease 029750-A and 029750-B covering Lots One, Two, Three, Four (1, 2, 3, 4), South Half of the North Half ($S\frac{1}{2}N\frac{1}{2}$) of Section Four (4), Township Eight (8), North of Range Fifty-nine (59), East, by reason of a certain instrument that is entitled, "Cooperative or Unit Plan of Development, Unit Number 5, Cedar Creek Anticline, Fallon County, Montana", said instrument being executed on or about the 7th day of February, 1935. That the parties to the said instrument were John Wight and the Gas Development Company, a corporation. That the defendants, Fidelity Gas Company, a corporation, and Montana Dakota Utilities Company, a corporation are the assignees and suc-

cessors in interest of the Gas Development Company, a corporation, in and to said instrument. That the defendants claim some right in and to the sands and strata underlying the surface of the land above described by reason of said instrument, and the right to prospect for and remove oil from said premises. That the claims and interests therein of the defendants, that each of them in and to the said premises and the sand and strata underlying them are without any right, title, or interest whatsoever and are adverse to and constitute a cloud upon said plaintiff's title to said premises.

That the defendants, and each of them claim some interest in and to the lands and leases of the plaintiff, H. C. Smith, described above as Government Leases 034165 and 034166 covering the Northwest Quarter of the Southeast Quarter ($NW\frac{1}{4}SE\frac{1}{4}$) of Section Eight (8), and Lot One (1) and the Southeast Quarter of the Northeast Quarter ($SE\frac{1}{4}NE\frac{1}{4}$) of Section Six (6), all in Township Eight (8), North of Range Fifty-nine (59), East of the Montana Principal Meridian, and Lots One and Two (1, 2) and the South Half of the Northeast Quarter ($S\frac{1}{2}NE\frac{1}{4}$) and the Southeast Quarter ($SE\frac{1}{4}$) of Section Two (2), in Township Eight (8), North of Range Fifty-nine (59), East of the Montana Principal Meridian by reason of a certain instrument that is entitled, "Cooperative or Unit Plan of Development, Unit Number 5, Cedar Creek Anticline, Fallon County, Montana", said instrument being executed on or about the 7th day of February, 1935. That the parties to the said instrument were one

C. M. Adams and the Gas Development Company, a corporation. That the defendants, Fidelity Gas Company, a corporation, and Montana Dakota Utilities Company, a corporation are the assignees and successors in interest of the said Gas Development Company, a corporation, in and to said instrument. That the defendants claim some right in and to the sands and strata underlying the surface of the land above described by reason of said instrument, and the right to prospect for and remove oil from said premises. That the claims and interests therein of the defendant and each of them, in and to the said premises and the sands and strata underlying them are without any right, title or interest whatsoever, and are adverse to and constitute a cloud upon plaintiffs' title to the said premises.

That the defendants, *in each of them* claim some interest in and to the lands and leases of the plaintiff, H. C. Smith, described above as Government Lease Number 0381253, covering the Southeast Quarter (SE $\frac{1}{4}$) of Section Thirteen (13), Township Eight (8), North Range Fifty-nine (59), East of the Montana Principal Meridian, by reason of a certain instrument that is entitled, "Cooperative or Unit Plan of Development, Unit Number 5, Cedar Creek Anticline, Fallon County, Montana", said instrument being executed on or about the 7th day of February, 1935. That the parties of the said instrument were one George Norbeck and the Gas Development Company, a corporation. That the defendants, Fidelity Gas Company, a corporation and Montana Dakota Utilities Company, a corporation

are the assignees and successors in interest of the Gas Development Company, a corporation in and to said instrument, that defendants claim some right in and to the said sand and strata underlying the surface of the land above described, and some right to prospect for and recover oil from said land, but the claims and interests therein of the defendant, and each of them in and to the said premises and the sands and strata underlying them are without any right, title or interest whatsoever, and are adverse to and constitute a cloud upon plaintiffs' title to the said premises.

Eleventh Cause of Action

I.

That the defendant, Fidelity Gas Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana, and that said defendant, Fidelity Gas Company, a corporation, is wholly owned by the defendant, Montana Dakota Utilities Company, a corporation; is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana.

II.

That the defendant, Shell Oil Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the

State of Delaware, and is duly qualified to do business within the State of Montana.

III.

That the defendants, Fidelity Gas Company, a corporation, and Montana Dakota Utilities Company, a corporation, are the common lessees of all of the plaintiffs herein within the provisions of Section 93-2813, Revised Codes of Montana, 1947. That the defendant, Shell Oil Company, a corporation, claims some interest in and to the lands and leases hereinafter described by, through and under the said lessees, the exact nature of the interest claimed by the defendant, Shell Oil Company, a corporation, being to the plaintiff, *H. B. Haney*, unknown.

IV.

That the plaintiff, *W. B. Haney*, is the holder of Government Leases, and in the possession, and entitled to the possession of lands situated in Fallon County, Montana which are described as follows, to-wit:

Government Lease 037591 covering the West Half of the Northwest Quarter ($W\frac{1}{2}NW\frac{1}{4}$) and the Southwest Quarter ($SW\frac{1}{4}$) of Section Thirteen (13), Township Eight (8) North Range Fifty-nine (59), East of the Montana Principal Meridian.

63/360ths interest in Government Lease Number 034165 covering the Northwest Quarter of the Southeast Quarter ($NW\frac{1}{4}SE\frac{1}{4}$) of Section Eight (8) and Lot One (1) and the Southeast Quarter of the Northeast Quarter ($SE\frac{1}{4}NE\frac{1}{4}$) of Section Six

(6), all in Township Eight (8), North of Range Fifty-nine (59), East of the Montana Principal Meridian.

63/360ths interest in Government Lease Number 034166 covering Lots One and Two (1, 2), the South Half of the Northeast Quarter ($S\frac{1}{2}NE\frac{1}{4}$), and the Southeast Quarter ($SE\frac{1}{4}$) of Section Two (2), Township Eight (8), North of Range Fifty-nine (59), East of the Montana Principal Meridian.

V.

That the defendants claim some right against the lands and leases of the plaintiff, W. B. Haney, described above as Government Leases 037591 covering the West Half of the Northwest Quarter ($W\frac{1}{2}NW\frac{1}{4}$) and the Southwest Quarter ($SW\frac{1}{4}$) of Section Thirteen (13), Township Eight (8) North Range Fifty-nine (59), East of the Montana Principal Meridian, under and by reason of a lease and operating agreement made and executed on or about the 16th day of May, 1934, wherein one George Norbeck is the party of the first part, and the defendant, Fidelity Gas Company, a corporation, is the party of the second part, and which said lease and operating agreement describes the lands above set forth. That said claims and interests therein of the defendants, and each of them in and to said premises are without any right, title or interest whatsoever, and are adverse to and constitute a cloud upon said plaintiff's title to his said premises.

VI.

'That the defendants claim some right against the

lands and leases of the plaintiff, W. B. Haney, described above as Government Leases 034165 and 034166, covering Lot One (1), in the Southeast Quarter of the Northeast Quarter ($SE\frac{1}{4}NE\frac{1}{4}$) of Section Six (6), and the Northwest Quarter ($NW\frac{1}{4}$) of the Southeast Quarter ($SE\frac{1}{4}$) of Section Eight (8), North Range Fifty-nine (59), East of the Montana Principal Meridian and the East Half ($E\frac{1}{2}$) of Section Two (2), Township Eight (8), North Range Fifty-nine (59) East, under and by reason of a lease and operating agreement made and executed on or about the 22nd day of February, 1935 wherein C. M. Adams is the party of the first part and the defendant, Fidelity Gas Company, a corporation, is the party of the second part, and which said lease and operating agreement describes the land above set forth. That said claims and interests therein of the defendant, and each of them in and to said premises are without any right, title or interest whatsoever, and are adverse to and constitute a cloud upon said plaintiff's title to said premises.

Twelfth Cause of Action

I.

That the defendant, Fidelity Gas Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana, and that said defendant, Fidelity Gas Company, a corporation, is wholly owned by the defendant, Montana Dakota Utilities Company, a corporation; that de-

fendant, Montana Dakota Utilities Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana.

II.

That the defendant, Shell Oil Company, a corporation, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, and is duly qualified to do business within the State of Montana.

III.

That the defendants, Fidelity Gas Company, a corporation, and Montana Dakota Utilities Company, a corporation, are the common lessees of all of the plaintiffs herein within the provisions of Section 93-2813, Revised Codes of Montana, 1947. That the defendant, Shell Oil Company, a corporation, claims some interest in and to the lands and leases hereinafter described by, through and under the said lessees, the exact nature of the interest claimed by the defendant, Shell Oil Company, a corporation, being to the plaintiff, W. B. Haney, unknown.

IV.

That the plaintiff, W. B. Haney, is the holder of Government Leases and in the possession, and entitled to the possession of lands situated in Fallon County, Montana which are described as follows, to-wit:

Government Lease 037591 covering the West Half

of the Northwest Quarter ($W\frac{1}{2}NW\frac{1}{4}$) and the Southwest Quarter ($SW\frac{1}{4}$) of Section Thirteen (13), Township Eight (8), North Range Fifty-nine (59), East of the Montana Principal Meridian.

63/360ths interest in Government Lease Number 034165 covering the Northwest Quarter of the Southeast Quarter ($NW\frac{1}{4}SE\frac{1}{4}$) of Section Eight (8) and Lot One (1) and the Southeast Quarter of the Northeast Quarter ($SE\frac{1}{4}NE\frac{1}{4}$) of Section Six (6) all in Township Eight (8), North of Range Fifty-nine (59), East of the Montana Principal Meridian.

63/360ths interest in Government Lease Number 034166 covering Lots One and Two (1, 2), the South Half of the Northeast Quarter ($S\frac{1}{2}NE\frac{1}{4}$) and the Southeast Quarter ($SE\frac{1}{4}$) of Section Two (2), Township Eight (8), North of Range Fifty-nine (59), East of the Montana Principal Meridian.

1.

Wherefore: Plaintiff, Cedar Creek Oil and Gas Company, a corporation, prays that the defendants, and each of them be required to appear and set forth their claim, if any they have of, in or to the leases and premises set forth in Paragraphs V and VI of the First Cause of Action, and Paragraphs V and VI of the Second Cause of Action herein, and that after trial had, herein, the Court find that the plaintiff, Cedar Creek Oil and Gas Company, a corporation, is the owner, in the possession and entitled to the possession of said leases and properties, and entitled to have its title quieted thereto, as against the defendants, and all other persons un-

known, claiming, or who may claim any right, title, estate or interest in, or lien or encumbrance upon the said real property and leases, or any thereof adverse to plaintiff's ownership, or any cloud upon plaintiffs' title thereto, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate, or accrued.

2.

Plaintiff, Mondakota Gas Company, a corporation, prays that the defendants, and each of them be required to appear and set forth their claims, if any they have, of, in or to the leases and premises described in Paragraph IV of the Third Cause of Action, and Paragraph V of the Fourth Cause of Action, and that after trial had, herein, the Court find, that the plaintiff, Cedar Creek Oil and Gas Company, a corporation, is the owner, in the possession, and entitled to the possession of said leases and properties, and entitled to have its title quieted thereto, as against the defendants, and all other persons unknown, claiming or who may claim any right, title, estate, or interest in, or lien or encumbrance upon the said real property and leases, any thereof adverse to plaintiffs' ownership, or any cloud upon plaintiffs' title thereto, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate, or accrued.

3.

Plaintiff, International Trust Company, a corporation, prays that the defendants, and each of them

be required to appear and set forth their claims, if any they have, of, in or to the leases and premises set forth in Paragraph V of the Fifth Cause of Action and Paragraph V of the Sixth Cause of Action, and after trial had, herein, the Court find that the plaintiff, International Trust Company, a corporation, is the owner, in the possession and entitled to the possession of said leases and properties, and entitled to have its title quieted thereto, as against the defendants, and all other persons unknown, claiming or who may claim any right, title, estate or interest in, or lien or encumbrance upon the said real property and leases, or any thereof adverse to plaintiffs' ownership, or any cloud upon plaintiffs' title thereto, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate or accrued.

4.

Plaintiff, Susan M. Wight prays that the defendants, and each of them be required to appear and set forth their claim, if any they have of, in or to the leases and premises set forth in Paragraphs IV and V of the Seventh Cause of Action, and Paragraphs IV and V of the Eighth Cause of Action, and after trial had, herein, the Court find that the plaintiff, Susan M. Wight is the owner, in the possession and entitled to the possession of said leases and properties, and entitled to have its title quieted thereto, as against the defendants, and all other persons unknown, claiming, or who may claim any right, title, estate or interest in, or lien or

encumbrance upon the said real property and leases, or any thereof adverse to plaintiffs' ownership, or any cloud upon plaintiffs' title thereto, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate or accrued.

5.

Plaintiff, H. C. Smith, prays that the defendants, and each of them be required to appear and set forth their claim, if any they have, of, in or to the leases and premises set forth in Paragraphs IV and V of the Ninth Cause of Action, and Paragraphs IV and V of the Tenth Cause of Action hereof, and that after trial had, herein, the Court find that the plaintiff, H. C. Smith is the owner, in the possession and entitled to the possession of said leases and properties, and entitled to have its title quieted thereto, as against the defendants, and all other persons unknown, claiming, or who may claim any right, title, estate or interest in, or lien or encumbrance upon the said real property and leases, or any thereof adverse to plaintiffs' ownership, or any cloud upon plaintiffs' title thereto, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate or accrued.

6.

Plaintiff, W. B. Haney, prays that the defendants, and each of them be required to appear and set forth their claim, if any they have, of, in or to the leases and premises set forth in Paragraphs

IV and V of the Eleventh Cause of Action, and Paragraphs IV and V of the Twelfth Cause of Action hereof, and that after trial had, herein, the Court find that the plaintiff, W. B. Haney is the owner, in the possession, and entitled to have its title quieted thereto, as against the defendants, and all other persons unknown, claiming, or who may claim any right, title, estate or interest in, or lien or encumbrance upon the said real property and leases, or any thereof adverse to plaintiffs' ownership, or any cloud upon plaintiffs' title thereto, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate or accrued.

7.

Plaintiffs pray costs of suit.

LEIF ERICKSON,

Attorney for the Plaintiffs

Duly Verified.

[Endorsed]: Filed February 25, 1953.

[Title of District Court and Cause.]

MOTION TO DISMISS

Come now the defendants and move the court to dismiss the action because the complaint and each cause of action therein fail to state claims against the defendants upon which relief can be granted.

Dated this 13th day of March, 1953.

COLEMAN, JAMESON & LAMEY,
/s/ By COLE CROWLEY,
A member of the firm,
Attorneys for Defendants

Of Counsel for Defendants Fidelity Gas Company
and Montana Dakota Utilities Company: Armin
Johnson, Faegre & Benson, Raymond Hilde-
brand.

[Endorsed]: Filed March 14, 1953.

[Title of District Court and Cause.]

ORDER OF DISQUALIFICATION

In the foregoing entitled cause, recently removed from the State Court to the above named court and the Billings Division thereof, the undersigned, one of the Judges of said Court, having given due consideration thereto, does not believe that he can preside in said cause with such absolute impartiality as the law requires, and, therefore, it is ordered that said cause be referred to Honorable W. D. Murray, the other Judge of said Court in said District, for hearing and decision.

/s/ CHARLES N. PRAY,
Judge.

[Endorsed]: Filed, entered, and noted in Civil Docket March 20, 1953. H. H. Walker, Clerk. By C. G. Kegel, Deputy.

[Title of District Court and Cause.]

ORDER DENYING MOTION TO REMAND

The Motion to Remand of the plaintiffs, having been submitted to the Court upon briefs, and the Court having considered said Motion and the Complaint herein, together with the briefs of the parties, and it appearing to the Court that the Third, Fifth, Seventh, Ninth and Eleventh causes of action in said complaint each allege a separate and independent cause of action which can be fully adjudicated between the respective plaintiffs in each of said causes of action and the defendants, without the presence of any other necessary or indispensable party, and that in each of such causes of action there is diversity of citizenship between the respective plaintiffs and all of the defendants, and the amount in controversy, exclusive of interest and costs, exceeds \$3,000.00;

Now, therefore, it is ordered and this does order that the Motion to Remand be, and the same hereby is denied.

Dated at Butte, Montana, this 27th day of May, 1953.

/s/ W. D. MURRAY,

United States District Judge

[Endorsed]: Filed May 27, 1953. Entered and Noted in Civil Docket May 28, 1953.

and effect and binding upon plaintiff, Cedar Creek Oil and Gas Company, and deny that the claims of the defendants in and to said premises are without right, title or interest.

Except as herein specifically admitted or alleged, defendants deny each and other other allegation contained in the first cause of action of the amended complaint.

Third Defense

That relying upon said Gas Unit Agreement, Fidelity Operating Agreement and similar agreements with other owners, lessees, and holders of interests in lands in the Cedar Creek Anticline, the defendants have carried on extensive and expensive geological and geophysical work on the lands described therein and on all lands in the Cedar Creek Anticline: that also relying thereon the defendants have expended large sums of money in carrying on drilling operations and development work on the lands claimed by the plaintiff and most of the land in the Cedar Creek Anticline, all of which has resulted in the production and sale of large quantities of gas from said lands and from most of the other lands within the Cedar Creek Anticline: that from said production and sales of gas the plaintiff has received and retained monetary and other benefits; that said drilling, exploration and development work has also resulted in the discovery and production of oil in the Cedar Creek Anticline; that the development thereof is now being, and for many years has been, carried on: that as the result of the geological and geophysical work and the drill-

ing, exploration and development as aforesaid, the value of all lands in the Cedar Creek Anticline, and in particular the lands claimed by the plaintiff, has been tremendously enhanced and its value as potential oil producing land has been demonstrated; that the said lands lie near the center of said Cedar Creek Anticline and if the relief prayed for in plaintiff's amended complaint is granted, the future development for the production of oil in the Cedar Creek Anticline, as now planned and carried on by the defendants, will be seriously impaired and much of the benefit of the defendants' work and expenditures, as hereinbefore alleged, will be lost.

That during the many years that the defendants have carried on the work and activities and made the expenditures as herein alleged, the plaintiff, notwithstanding its knowledge thereof, has failed to assert any claim that the Gas Unit Agreement or the Fidelity Operating Agreement were not in full force and effect; that it was not until the value of said land had been greatly enhanced and its oil producing possibilities were demonstrated by the work and expenditures of the defendants that any assertion was made by the plaintiff that said agreements were no longer in effect.

That because of the foregoing plaintiff is estopped from obtaining the relief sought in its complaint with respect to the premises described therein.

Fourth Defense

That by reason of the facts set out in the Third

Defense plaintiff has waived any right to obtain the relief sought in its complaint with respect to the premises described therein.

Fifth Defense

That by reason of the facts set out in the Third Defense, plaintiff is guilty of laches and barred from obtaining the relief sought in its complaint with respect to the premises described therein.

Answer to Second Cause of Action

As and for their answer to the second cause of action of the amended complaint herein, defendants Fidelity Gas Co., Montana-Dakota Utilities Co. and Shell Oil Company allege as follows:

First Defense

The second cause of action of the amended complaint fails to state a claim against defendants upon which relief can be granted.

Second Defense

Admit the allegations contained in Paragraphs I, II and III; answering Paragraph IV admit that defendant, Shell Oil Company, claims some interest in the land and leases described; deny the remaining allegations of Paragraph IV and all of the allegations of Paragraphs V and VI.

Answering Paragraph VII defendants allege that they are in possession of and claim rights in and to the lands and leases described in the said second cause of action by reason of the following agreements:

(Said agreements are the same and identical

with agreements numbered one through five and referred to and described in the second defense to the first cause of action.)

That defendant, Montana-Dakota Utilities Co., is the successor by merger to the rights of Gas Development Company under the agreements referred to above.

Allege that said agreements are all in full force and effect and binding upon plaintiff, Cedar Creek Oil and Gas Company, and deny that the claims of the defendants in and to said premises are without right, title or interest.

Except as herein specifically admitted or alleged, defendants deny each and every other allegation contained in the second cause of action of the amended complaint.

Third Defense

Defendants repeat and reallege each and every allegation contained in its third defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fourth Defense

Defendants repeat and reallege each and every allegation contained in its fourth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fifth Defense

Defendants repeat and reallege each and every allegation contained in its fifth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to Third Cause of Action

As and for their answer to the third cause of action of the amended complaint herein, defendants Fidelity Gas Co. and Montana-Dakota Utilities Co. and Shell Oil Company allege as follows:

First Defense

The third cause of action of the amended complaint fails to state a claim against defendants upon which relief can be granted.

Second Defense

Defendants admit the allegations contained in Paragraphs I, II, and III of the third cause of action of the amended complaint; answering Paragraph IV admit that defendant, Shell Oil Company, claims some interest in the lands and leases described and deny the remaining allegations thereof; allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first paragraph numbered VI, which is in fact Paragraph V of the third cause of action, and therefore deny the same.

Answering the second paragraph of the third cause of action bearing number "VI", defendants allege that they are in possession of and claim rights in and to the lands and leases described in the said third cause of action by reason of the following agreements:

1. Fidelity Operating Agreement dated May 24, 1934, between L. M. Walker and defendant Fidelity Gas Co., said agreement covering among other

lands the same lands referred to in the first paragraph numbered VI in the third cause of action and which with the exception of the name and address of the party of the first part, the date and the description of lands therein contained and the designation of the bank to which payments are to be made, said agreement is identical with Exhibit "A" hereof.

2. Fidelity Operating Agreement dated October 16, 1936, between Atlantic Pacific Oil Company of Montana and defendant Fidelity Gas Co., said agreement covering among other lands the same lands referred to in the first paragraph numbered VI in the third cause of action and which, with the exception of the name and address of the party of the first part, the date and the description of lands therein contained and the designation of the bank to which payments are to be made, said agreement is identical with Exhibit "A" hereof.

3. Gas Unit Agreement dated May 26, 1934, between L. M. Walker and Gas Development Company, said agreement covering among other lands the same lands referred to in the first paragraph numbered VI in the third cause of action and which, with the exception of the names of the contracting parties other than said Gas Development Company, description of properties, percentage figures of participation and the date and place of execution, said agreement is identical with Exhibit "B" hereof.

4. Gas Unit Agreement between Atlantic Pacific Oil Company of Montana and Gas Development

Company, said agreement covering among other lands the same lands referred to in the first paragraph numbered VI in the third cause of action and which, with the exception of the names of the contracting parties other than said Gas Development Company, description of properties, percentage figures of participation and the date and place of execution, said agreement is identical with Exhibit "B" hereof.

5. Gas Purchase Agreement dated May 26, 1934, between L. M. Walker and Gas Development Company, said agreement covering among other lands the same lands referred to in the first paragraph numbered VI in the third cause of action, and which with the exception of the name and address of the party of the first part, the date and description of the lands therein contained, term, and address of "Vendor" where notices are to be sent, said agreement is identical with Exhibit "C" hereof.

6. Gas Purchase Agreement dated October 17, 1939, between Leona M. Walker, John Wight and Susan Wight, and Montana-Dakota Utilities Co., said agreement covering among other lands the same lands referred to in the first paragraph numbered VI in the third cause of action, and which with the exception of the names and addresses of the parties, the date and description of the lands therein contained and the address of "Vendor", where notices are to be sent, said agreement is identical with Exhibit "C" hereof.

7. Operating Agreement, dated April 10, 1951, by and between defendants, Montana-Dakota Utili-

ties Co., Fidelity Gas Co. and Shell Oil Company, a true copy of which is attached hereto and marked Exhibit "D" and hereby made a part hereof.

That defendant, Montana-Dakota Utilities Co., is the successor by merger to the rights of Gas Development Company under the agreements referred to above.

Allege that said agreements are all in full force and effect and binding upon plaintiff, Mondakota Gas Company, and deny that the claims of the defendants in and to said premises are without right, title or interest.

Except as herein specifically admitted or alleged, defendants deny each and every other allegation contained in the third cause of action of the amended complaint.

Third Defense

Defendants repeat and reallege each and every allegation contained in its third defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fourth Defense

Defendants repeat and reallege each and every allegation contained in its fourth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fifth Defense

Defendants repeat and reallege each and every allegation contained in its fifth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to Fourth Cause of Action

As and for their answer to the fourth cause of action of the amended complaint herein, defendants Fidelity Gas Co., Montana-Dakota Utilities Co. and Shell Oil Company allege as follows:

First Defense

The fourth cause of action of the amended complaint fails to state a claim against defendants upon which relief can be granted.

Second Defense

Defendants admit the allegations contained in Paragraphs I, II and III of the fourth cause of action of the amended complaint; answering Paragraph IV admit that the defendant, Shell Oil Company, claims some interest in the lands and leases described and deny the remaining allegations thereof; allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph V thereof and therefore deny the same.

Answering Paragraph VI of the fourth cause of action defendants allege that they are in possession of and claim rights in and to the lands and leases described in the fourth cause of action by reason of the following agreements:

(Said agreements are the same and identical with agreements numbered one through seven and referred to and described in the second defense to the third cause of action.)

That defendants, Montana-Dakota Utilities Co., is the successor by merger to the rights of Gas De-

velopment Company under the agreements referred to above.

Allege that said agreements are in full force and effect and binding upon plaintiff, Mondakota Gas Company, and deny that the claims of defendants in and to said premises are without right, title or interest.

Except as herein specifically admitted or alleged, defendants deny each and every other allegation contained in the fourth cause of action of the amended complaint.

Third Defense

Defendants repeat and reallege each and every allegation contained in its third defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fourth Defense

Defendants repeat and reallege each and every allegation contained in its fourth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fifth Defense

Defendants repeat and reallege each and every allegation contained in its fifth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to Fifth Cause of Action

As and for their answer to the fifth cause of action of the amended complaint herein, defendants Fidelity Gas Co., Montana-Dakota Utilities Co. and Shell Oil Company allege as follows:

First Defense

The fifth cause of action of the amended complaint fails to state a claim against defendants upon which relief can be granted.

Second Defense

Defendants admit the allegations contained in Paragraphs I, II and III of the fifth cause of action of the amended complaint; answering Paragraph IV admit that defendant Shell Oil Company claims some interest in the lands and leases described and deny the remaining allegations thereof; in answer to Paragraph V thereof, defendants allege that plaintiff The International Trust Company is the assignee of the government lease of the lands therein described, but defendants deny that said plaintiff is in possession or entitled to possession of said lands.

Answering Paragraph VI of the fifth cause of action, defendants allege that they are in possession of and claim rights in and to the property described therein by reason of the following agreements:

1. Fidelity Operating Agreement dated May 29, 1934, between Clarence W. Carter and Josie A. Carter and defendant Fidelity Gas Co., said agreement covering the same lands referred to in paragraph V of the fifth cause of action and with the exception of the name and address of the party of the first part, the date and the description of lands therein contained and the designation of the bank to which payments are to be made, said agreement is identical with Exhibit "A" hereof.

2. Fidelity Operating Agreement dated October 16, 1936, between Atlantic Pacific Oil Company of Montana and defendant Fidelity Gas Co., said agreement covering the same lands referred to in paragraph V of the fifth cause of action and with the exception of the name and address of the party of the first part, the date and the description of lands therein contained and the designation the bank to which payments are to be made, said agreement is identical with Exhibit "A" hereof.

3. Gas Unit Agreement dated January 11, 1935, between Clarence W. Carter and Josie A. Carter and Gas Development Company, said agreement covering the same lands referred to in paragraph V of the fifth cause of action and with the exception of the names of the contracting parties other than said Gas Development Company, description of properties, percentage figures of participation and the date, and place of execution, said agreement is identical with Exhibit "B" hereof.

4. Gas Unit Agreement dated October 16, 1936, between Atlantic Pacific Oil Company of Montana and Gas Development Company, said agreement covering the same lands referred to in paragraph V of the fifth cause of action and with the exception of the names of the contracting parties other than said Gas Development Company, description of properties, percentage figures of participation and the date and place of execution, said agreement is identical with Exhibit "B" hereof.

5. Gas Purchase Agreement dated October 1, 1934, between Clarence W. Carter and Josie A.

Carter and Gas Development Company, said agreement covering the same lands referred to in paragraph V of the fifth cause of action, and with the exception of the name and address of the party of the first part, the date and description of the lands therein contained, term, and address of "Vendor" where notices are to be sent, said agreement is identical with Exhibit "C" hereof.

6. Gas Purchase Agreement dated October 16, 1936, between Atlantic Pacific Oil Company of Montana and Montana-Dakota Utilities Co., said agreement covering the same lands referred to in paragraph V of the fifth cause of action, and which with the exception of the names and addresses of the parties, the date and description of the lands therein contained and the address of "Vendor", where notices are to be sent, said agreement is identical with Exhibit "C" hereof.

7. Gas Purchase Agreement dated October 6, 1939, between Clarence W. Carter, Josie A. Carter, John Wight, Susan Wight, Estate of Eugenia Stults by John Wight, administrator, and Montana-Dakota Utilities Co., said agreement covering the same lands referred to in paragraph V of the fifth cause of action, and with the exception of the names and addresses of the parties, the dates, and description of the lands therein contained and the address of the "Vendor" where notices are to be sent, said agreement is identical with Exhibit "C" hereof.

8. Operating Agreement, dated April 10, 1951, by and between defendants, Montana-Dakota Utilities Co., Fidelity Gas Co. and Shell Oil Company, a

true copy of which is attached hereto and marked Exhibit "D" and hereby made a part hereof.

That defendant, Montana-Dakota Utilities Co., is the successor by merger to the rights of Gas Development Company under the agreements referred to above.

Allege that said agreements are all in full force and effect and binding upon plaintiff, International Trust Company, and deny that the claims of the defendants in and to said premises are without right, title or interest.

Except as herein specifically admitted or alleged, defendants deny each and every other allegation contained in the fifth cause of action of the amended complaint.

Third Defense

Defendants repeat and reallege each and every allegation contained in its third defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fourth Defense

Defendants repeat and reallege each and every allegation contained in its fourth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fifth Defense

Defendants repeat and reallege each and every allegation contained in its fifth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to Sixth Cause of Action

As and for their answer to the sixth cause of action of the amended complaint herein, defendants Fidelity Gas Co., Montana-Dakota Utilities Co. and Shell Oil Company allege as follows:

First Defense

The sixth cause of action of the amended complaint fails to state a claim against defendants upon which relief can be granted.

Second Defense

Defendants admit the allegations contained in Paragraphs I, II and IV of the sixth cause of action of the amended complaint; answering Paragraph III admit that defendant, Shell Oil Company, claims some interest in the lands and leases described and deny the remaining allegations thereof; and in answer to Paragraph V thereof, defendants allege that plaintiff, International Trust Company, is the assignee of the government lease of the lands therein described, but defendants deny that said plaintiff is in possession or entitled to possession of said lands.

Answering Paragraph VI of the sixth cause of action, defendants allege that they are in possession of and claim rights in and to the property described in the said sixth cause of action by reason of the following agreements:

(Said agreements are the same and identical with agreements numbered one through eight and referred to and described in the second defense to the fifth cause of action.)

That defendant, Montana-Dakota Utilities Co., is the successor by merger to the rights of Gas Development Company under the agreements referred to above.

Allege that said agreements are all in full force and effect and binding upon plaintiff, International Trust Company, and deny that the claims of the defendants in and to said premises are without right, title or interest.

Except as herein specifically admitted or alleged, defendants deny each and every other allegation contained in the sixth cause of action of the amended complaint.

Third Defense

Defendants repeat and reallege each and every allegation contained in its third defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fourth Defense

Defendants repeat and reallege each and every allegation contained in its fourth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fifth Defense

Defendants repeat and reallege each and every allegation contained in its fifth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to Seventh Cause of Action

As and for their answer to the seventh cause of

action of the amended complaint herein, defendants Fidelity Gas Co., Montana-Dakota Utilities Co. and Shell Oil Company allege as follows:

First Defense

The seventh cause of action of the amended complaint fails to state claim against defendants upon which relief can be granted.

Second Defense

Defendants admit the allegations contained in Paragraphs I and II of the seventh cause of action of the amended complaint; answering Paragraph III admit that defendant, Shell Oil Company, claims some interest in the lands and leases described and deny the remaining allegations thereof; allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs IV and V thereof and therefore deny the same.

Answering Paragraph VI of the said seventh cause of action, defendants allege that they are in possession of and claim rights in and to the property described in the seventh cause of action by reason of the following agreements:

1. Fidelity Operating Agreement dated May 16, 1934, between George Norbeck and Jane M. Norbeck to Fidelity Gas Co., said agreement covering among other lands the same lands referred to in the second paragraph of paragraph IV of the seventh cause of action and with the exception of the name and address of the party of the first part, the date and description of the lands therein contained, and

the designation of the bank to which payments are to be made, said agreement is identical with Exhibit "A" hereof.

2. Fidelity Operating Agreement dated February 27, 1935, between George Norbeck and Jane M. Norbeck to Fidelity Gas Co., said agreement covering among other lands, the same lands referred to in the third paragraph of paragraph IV of the seventh cause of action and with the exception of the name and address of the party of the first part, the date and description of the lands therein contained, and the designation of the bank to which payments are to be made, said agreement is identical with Exhibit "A" hereof.

3. Fidelity Operating Agreement dated February 5, 1935, between Susie Beck, Al Hanson, Louise Hanson, Norbeck Company and Fidelity Gas Co., said agreement covering among other lands the same lands referred to in paragraph V of the seventh cause of action and with the exception of the name and address of the party of the first part, the date and description of the lands therein contained, and the designation of the bank to which payments are to be made, said agreement is identical with Exhibit "A" hereof.

4. Gas Unit Agreement dated May 19, 1934, between George Norbeck, Jane M. Norbeck and Gas Development Company, said agreement covering among other lands the same lands referred to in the second paragraph of paragraph IV of the seventh cause of action and with the exception of the names of the contracting parties other than Gas Develop-

ment Company, description of properties, percentage figures of participation and the date and place of execution said agreement is identical with Exhibit "B" hereof.

5. Gas Unit Agreement dated February 27, 1935, between George Norbeck, Jane M. Norbeck and Gas Development Company, said agreement covering among other lands the same lands referred to in the third paragraph of paragraph IV of the seventh cause of action and with the exception of the names of the contracting parties other than Gas Development Company, description of properties, percentage figures of participation and the date and place of execution said agreement is identical with Exhibit "B" hereof.

6. Gas Unit Agreement dated January 8, 1935, between Susie Beck, Al Hanson, Louise Hanson and Norbeck Company and Gas Development Company, said agreement covering among other lands the same lands referred to in paragraph V of the seventh cause of action and with the exception of the names of the contracting parties other than Gas Development Company, description of properties, percentage figures of participation and date and place of execution said agreement is identical with Exhibit "B" hereof.

7. Gas Purchase Agreement dated May 16, 1934, between George Norbeck, Jane M. Norbeck and Gas Development Company, said agreement covering among other lands the same lands referred to in the second paragraph of paragraph IV of the seventh cause of action and with the exception of the name

of the vendor, the dates and description of the lands therein contained, the term, and the address of "Vendor", where notices are to be sent, said agreement is identical with Exhibit "C" hereof.

8. Gas Purchase Agreement dated October 16, 1939, between John Wight, Susan Wight and Montana-Dakota Utilities Company, said agreement covering among other lands the same lands referred to in the second paragraph of paragraph IV of the seventh cause of action and with the exception of the names of the parties, the dates and description of the lands therein contained, and the address of "vendor" where notices are to be sent, said agreement is identical with Exhibit "C" hereof.

9. Gas Purchase Agreement, dated February 27, 1935, between George Norbeck, Jane M. Norbeck and Gas Development Company, said agreement covering among other lands the same lands referred to in the third paragraph of paragraph IV of the seventh cause of action and with the exception of the names of the parties, the dates and description of the lands therein contained, and the address of "Vendor" where notices are to be sent, said agreement is identical with Exhibit "C" hereof.

10. Gas Purchase Agreement, dated January 8, 1935, between Susie Beck, Al Hanson, Louise Hanson, Norbeck Company and Gas Development Company said agreement covering among other lands, the same lands referred to in paragraph V of the seventh cause of action and with the exception of the names of the parties, the dates and description of the lands therein contained, and the address of

“Vendor” where notices are to be sent, said agreement is identical with Exhibit “C” hereof.

11. Operating Agreement, dated April 10, 1951, by and between defendants, Montana-Dakota Utilities Co., Fidelity Gas Co. and Shell Oil Company, a true copy of which is attached hereto and marked Exhibit “D” and hereby made a part hereof.

That defendant, Montana-Dakota Utilities Co., is the successor by merger to the rights of Gas Development Company under the agreements referred to above.

Allege that said agreements are all in full force and effect and binding upon plaintiff, Susan M. Wight and deny that the claims of the defendants in and to said premises are without right, title or interest.

Except as herein specifically admitted or alleged, defendants deny each and every other allegation contained in the seventh cause of action of the amended complaint.

Third Defense

Defendants repeat and reallege each and every allegation contained in its third defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fourth Defense

Defendants repeat and reallege each and every allegation contained in its fourth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fifth Defense

Defendants repeat and reallege each and every allegation contained in its fifth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to Eighth Cause of Action

As and for their answer to the eighth cause of action of the amended complaint herein, defendants Fidelity Gas Co., Montana-Dakota Utilities Co. and Shell Oil Company allege as follows:

First Defense

The eighth cause of action of the amended complaint fails to state a claim against defendants upon which relief can be granted.

Second Defense

Defendants admit the allegations contained in Paragraphs I and II of the eighth cause of action of the amended complaint; answering paragraph III admit that defendant, Shell Oil Company, claims some interest in the lands and leases described and deny the remaining allegations thereof; allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs IV and V thereof and therefore deny the same.

Answering Paragraph VI of the eighth cause of action, defendants allege that they are in possession of and claim rights in and to the property described in said eighth cause of action by reason of the following agreements:

(Said agreements are the same and identical

with agreements numbered one through eleven and referred to and described in the seventh cause of action.)

That defendant, Montana-Dakota Utilities Co., is the successor by merger to the rights of Gas Development Company under the agreements referred to above.

Allege that said agreements are all in full force and effect and binding upon plaintiff, Susan M. Wight, and deny that the claims of the defendants in and to said premises are without right, title or interest.

Except as herein specifically admitted or alleged, defendants deny each and every other allegation contained in the eighth cause of action of the amended complaint.

Third Defense

Defendants repeat and reallege each and every allegation contained in its third defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fourth Defense

Defendants repeat and reallege each and every allegation contained in its fourth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fifth Defense

Defendants repeat and reallege each and every allegation contained in its fifth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to Ninth Cause of Action

As and for their answer to the ninth cause of action of the amended complaint herein, defendants Fidelity Gas Co., Montana-Dakota Utilities Co. and Shell Oil Company allege as follows:

First Defense

The ninth cause of action of the amended complaint fails to state a claim against defendants upon which relief can be granted.

Second Defense

Defendants admit the allegations contained in Paragraphs I and II of the ninth cause of action of the amended complaint; answering Paragraph III admit that defendant, Shell Oil Company, claims some interest in the lands and leases described and deny the remaining allegations thereof. In answer to Paragraph IV thereof, defendants allege that plaintiff H. C. Smith is the assignee of Government Leases Nos. Bl. 029750-A and 029750-B of the lands described in said Paragraph IV under said leases; allege that said plaintiff H. C. Smith holds a fractional interest, $213/360$ ths, of Government Leases Nos. Bl. 034165 and 034166 of the lands described in said Paragraph IV under said leases; and said plaintiff H. C. Smith holds by assignment, the rights of lessee to the $SE\frac{1}{4}$ of Section 13, Township 8 North, Range 59 East of the Montana Principal Meridian to which property the number Bl. 038253 has been assigned; defendants deny that plaintiff H. C. Smith is in possession or entitled to possession of any of said lands.

Answering Paragraph V of the Ninth Cause of Action, defendants allege that they are in possession of and claim rights in and to the properties described therein by reason of the following agreements:

1. Fidelity Operating Agreement dated June 12, 1934, between John Wight and defendant Fidelity Gas Co., said agreement covering the lands referred to in the second paragraph of paragraph IV of the ninth cause of action and with the exception of the name and address of the party of the first part, the date and description of lands therein contained and the designation of the bank to which payments are to be made, said agreement is identical with Exhibit "A" hereof.

2. Fidelity Operating Agreement, dated June 10, 1934, between C. M. Adams, J. H. Adams and defendant Fidelity Gas Co., said agreement covering among other lands the same lands referred to in the third and fourth paragraphs of paragraph IV of the ninth cause of action and with the exception of the name and address of the party of the first part, the date and description of lands therein contained and the designation of the bank to which payments are to be made, said agreement is identical with Exhibit "A" hereof.

3. Fidelity Operating Agreement dated May 16, 1934, between George Norbeck and Jane M. Norbeck and defendant Fidelity Gas Co. said agreement covering among other lands the same lands referred to in the fifth paragraph of paragraph IV of the ninth cause of action and with the exception

of the name and address of the party of the first part, the date and description of lands therein contained and the designation of the bank to which payments are to be made, said agreement is identical with Exhibit "A" hereof.

4. Gas Unit Agreement dated Jan. 22, 1935, between C. M. Adams, J. H. Adams and Gas Development Co., said agreement covering among other lands the same lands referred to in the third and fourth paragraphs of paragraph IV of the ninth cause of action and with the exception of the names of the contracting parties other than Gas Development Company, description of the properties, percentage figures of participation and the date and place of execution, said agreement is identical with Exhibit "B" hereof.

5. Gas Unit Agreement, dated June 11, 1934, between John Wight, Susan Wight, and Gas Development Company, said agreement covering among other lands the same lands referred to in the second paragraph of paragraph IV of the ninth cause of action and with the exception of the names of the contracting parties other than Gas Development Company, description of the properties, percentage figures of participation and the date and place of execution, said agreement is identical with Exhibit "B" hereof.

6. Gas Unit Agreement dated May 16, 1934, between George Norbeck, Jane M. Norbeck and Gas Development Company, said agreement covering among other lands the same lands referred to in the fifth paragraph of paragraph IV of the ninth cause

of action and with the exception of the names of the contracting parties other than Gas Development Company, description of the properties, percentage figures of participation and the date and place of execution, said agreement is identical with Exhibit "B" hereof.

7. Gas Purchase Agreement dated July 10, 1934, between C. M. Adams, J. H. Adams and Gas Development Company, said agreement covering among other lands the same lands referred to in the third and fourth paragraphs of paragraph IV of the ninth cause of action, and with the exception of the name and address of the party of the first part, the date and description of the lands therein contained and the address of "Vendor", where notices are to be sent, said agreement is identical with Exhibit "C" hereof.

8. Gas Purchase Agreement dated December 19, 1939, between Black Hills Gas and Oil Company and Montana-Dakota Utilities Co., said agreement covering among other lands, except for Lot One (1) of Section Six, Township 8 N., Range 59 E M.P.M., the same lands referred to in the third and fourth paragraphs of paragraph IV of the ninth cause of action, and with the exception of the names and addresses of the parties the date and description of the lands therein contained and the address of "Vendor", where notices are to be sent, said agreement is identical with Exhibit "C" hereof.

9. Gas Purchase Agreement dated June 11, 1934, between John Wight and Gas Development Company, said agreement covering the same lands re-

ferred to in the second paragraph of paragraph IV of the ninth cause of action, and with the exception of the names of the party of the first part, term, the date and description of the lands therein contained and the address of "Vendor", where notices are to be sent, said agreement is identical with Exhibit "C" hereof.

10. Gas Purchase Agreement dated December 19, 1939, between W. B. Haney, Mabel G. Haney and Montana-Dakota Utilities Co., said agreement covering the same lands referred to in the second paragraph of paragraph IV of the ninth cause of action, and with the exception of the names and addresses of the parties, the date and description of the lands therein contained and the address of "Vendor", where notices are to be sent, said agreement is identical with Exhibit "C" hereof.

11. Gas Purchase Agreement dated May 16, 1934, between George Norbeck and Jane M. Norbeck and Gas Development Company, said agreement covering among other lands the same lands referred to in the fifth paragraph of paragraph IV of the ninth cause of action, and with the exception of the name and address of the party of the first part, term, the date and description of the lands therein contained and the address of "Vendor", where notices are to be sent, said agreement is identical with Exhibit "C" hereof.

12. Gas Purchase Agreement, dated March 4, 1940, between Herman C. Smith, Dephene Smith and Montana-Dakota Utilities Co., said agreement covering the same land referred to in the fifth para-

graph of paragraph IV of the ninth cause of action, and with the exception of the names and addresses of the parties, the date and description of the lands therein contained and the address of "Vendor", where notices are to be sent, said agreement is identical with Exhibit "C" hereof.

13. Operating Agreement, dated April 10, 1951, by and between defendants, Montana-Dakota Utilities Co., and Shell Oil Company, a true copy of which is attached hereto and marked Exhibit "D" and hereby made a part hereof.

That defendant, Montana-Dakota Utilities Co., is the successor by merger to the rights of Gas Development Company under the agreements referred to above.

Allege that said agreements are in full force and effect and binding upon plaintiff, H. C. Smith, and deny that the claim of defendants in and to said premises are without right, title or interest.

Except as herein specifically admitted or alleged, defendants deny each and every other allegation contained in the ninth cause of action of the amended complaint.

Third Defense

Defendants repeat and reallege each and every allegation contained in its third defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fourth Defense

Defendants repeat and reallege each and every allegation contained in its fourth defense to the

first cause of action with the same effect as if repeated at length in this paragraph.

Fifth Defense

Defendants repeat and reallege each and every allegation contained in its fifth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to Tenth Cause of Action

As and for their answer to the tenth cause of action of the amended complaint herein, defendants Fidelity Gas Co., Montana-Dakota Utilities Co. and Shell Oil Company allege as follows:

First Defense

The tenth cause of action of the amended complaint fails to state a claim against defendants upon which relief can be granted.

Second Defense

Defendants admit the allegations contained in Paragraphs I and II of the tenth cause of action of the amended complaint; answering Paragraph III admit that defendant, Shell Oil Company, claims some interest in the lands and leases described and deny the remaining allegations thereof. In answer to Paragraph IV thereof, defendants allege that plaintiff H. C. Smith is the assignee of Government Leases Nos. Bl. 029750-A and 029750-B of the lands described in said Paragraph IV under said leases; allege that said plaintiff H. C. Smith holds a fractional interest, $213/360$ ths, of Government Leases Nos. Bl. 034165 and 034166 of the lands described

in said Paragraph IV under said leases; and said plaintiff H. C. Smith holds by assignment, the rights of lessee to the SE $\frac{1}{4}$ of Section 13, Township 8 North, Range 59 East of the Montana Principal Meridian to which property the number Bl. 038253 has been assigned; defendants deny that plaintiff H. C. Smith is in possession or entitled to possession of any of said lands.

Answering Paragraph V of the tenth cause of action, defendants allege that they are in possession of and claim rights in and to the properties described therein by reason of the following agreements:

(Said agreements are the same and identical with agreements numbered one through thirteen and referred to and described in the second defense to the ninth cause of action.)

That defendant, Montana-Dakota Utilities Co., is the successor by merger to the rights of Gas Development Company under the agreements referred to above.

Allege that said agreements are in full force and effect and binding upon plaintiff, H. C. Smith, and deny that the claim of defendants in and to said premises are without right, title or interest.

Except as herein specifically admitted or alleged, defendants deny each and every other allegation contained in the tenth cause of action of the amended complaint.

Third Defense

Defendants repeat and reallege each and every allegation contained in its third defense to the first

cause of action with the same effect as if repeated at length in this paragraph.

Fourth Defense

Defendants repeat and reallege each and every allegation contained in its fourth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fifth Defense

Defendants repeat and reallege each and every allegation contained in its fifth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to Eleventh Cause of Action

As and for their answer to the eleventh cause of action of the amended complaint herein, defendants Fidelity Gas Co., Montana-Dakota Utilities Co. and Shell Oil Company allege as follows:

First Defense

The eleventh cause of action of the amended complaint fails to state a claim against defendants upon which relief can be granted.

Second Defense

Defendants admit the allegations contained in Paragraphs I and II of the eleventh cause of action of the amended complaint; answering Paragraph III admit that defendant, Shell Oil Company, claims some interest in the lands and leases described and deny the remaining allegations thereof; in answer to Paragraph IV thereof, defendants allege that the plaintiff W. B. Haney holds by

assignment, the rights of lessee in and to the $W\frac{1}{2}$ of the $NW\frac{1}{4}$ and the $SW\frac{1}{4}$ of Section 13, Township 8 North, Range 59 East of the Montana Principal Meridian to which lease No. Bl. 037591 has been assigned. Allege that said plaintiff W. B. Haney holds a fractional interest, $\frac{63}{360}$ ths, of Government Leases Nos. Bl. 034165 and 034166 of the lands described in said Paragraph IV under said leases. Defendants deny that Plaintiff W. B. Haney is in possession or entitled to possession of said lands.

Answering Paragraphs V and VI of the eleventh cause of action, defendants allege that they are in possession of and claim rights in and to the property described therein by reason of the following agreements:

1. Fidelity Operating Agreement, dated May 16, 1934, between George Norbeck and Jane M. Norbeck to Fidelity Gas Co., said agreement covering among other lands the same lands referred to in the second paragraph of paragraph IV of the eleventh cause of action and with the exception of the name and address of the party of the first part, the date and description of the lands therein contained and the designation of the bank to which payments are to be made, said agreement is identical with Exhibit "A" hereof.

2. Fidelity Operating Agreement, dated June 10, 1934, between C. M. Adams, J. H. Adams, and Fidelity Gas Co., said agreement covering among other lands the same lands referred to in the third and fourth paragraphs of paragraph IV of the

eleventh cause of action and with the exception of the name and address of the party of the first part, the date and description of the lands therein contained and the designation of the bank to which payments are to be made, said agreement is identical with Exhibit "A" hereof.

3. Gas Unit Agreement, dated May 16, 1934, between George Norbeck and Jane M. Norbeck, and Gas Development Company, said agreement covering among other lands the same lands described in the second paragraph of paragraph IV of the eleventh cause of action and with the exception of the names of the contracting parties other than Gas Development Company, description of the properties, percentage figures of participation, and the date and place of execution, said agreement is identical with Exhibit "B" hereof.

4. Gas Unit Agreement, dated January 22, 1935, between C. M. Adams, J. H. Adams and Gas Development Company, said agreement covering among other lands the same lands referred to in the third and fourth paragraphs of paragraph IV of the eleventh cause of action and with the exception of the names of the contracting parties other than the Gas Development Company, description of the properties, percentage figures of participation and the date and place of execution, said agreement is identical with Exhibit "B" hereof.

5. Gas Purchase Agreement, dated May 16, 1934, between George Norbeck, Jane M. Norbeck and Gas Development Company, said agreement covering among other lands the same lands referred

to in the second paragraph of paragraph IV of the eleventh cause of action, and with the exception of the term, name and address of the party of the first part, the date and description of the lands therein contained, and address of "Vendor" where notices are to be sent, said agreement is identical with Exhibit "C" hereof.

6. Gas Purchase Agreement, dated July 10, 1934, between C. M. Adams, J. H. Adams and Gas Development Company, said agreement covering among other lands the same lands referred to in the third and fourth paragraphs of paragraph IV of the eleventh cause of action, and with the exception of the name and address of the party of the first part, the date and description of the lands therein contained, and address of "Vendor" where notices are to be sent, said agreement is identical with Exhibit "C" hereof.

7. Gas Purchase Agreement dated December 19, 1939, between Black Hills Gas & Oil Company, and Montana-Dakota Utilities Co. said agreement covering, except for Lot One (1) of Section Six (6), Township Eight (8) North, Range 59 East, M.P.M., the lands referred to in the third and fourth paragraphs of paragraph IV of the eleventh cause of action, and with the exception of the names and addresses of the parties, the date and description of the lands therein contained, and the address of the "Vendor," where notices are to be sent, said agreement is identical with Exhibit "C" hereof.

8. Operating Agreement, dated April 10, 1951, by and between defendants, Montana-Dakota Utili-

ties Co., Fidelity Gas Co. and Shell Oil Company, a true copy of which is attached hereto and marked Exhibit "D" and hereby made a part hereof.

That defendant, Montana-Dakota Utilities Co., is a successor by merger to the rights of Gas Development Company and the agreements referred to above.

Allege that said agreements are all in full force and effect and binding upon plaintiff, W. B. Haney, and deny that the claims of the defendants in and to said premises are without right, title and interest.

Except as herein specifically admitted or alleged, defendants deny each and every other allegation contained in the eleventh cause of action of the amended complaint.

Third Defense

Defendants repeat and reallege each and every allegation contained in its third defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fourth Defense

Defendants repeat and reallege each and every allegation contained in its fourth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fifth Defense

Defendants repeat and reallege each and every allegation contained in its fifth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to Twelfth Cause of Action

As and for their answer to the twelfth cause of action of the amended complaint herein, defendants Fidelity Gas Co., Montana-Dakota Utilities Co. and Shell Oil Company allege as follows:

First Defense

The twelfth cause of action of the amended complaint fails to state a claim against defendants upon which relief can be granted.

Second Defense

Defendants admit the allegations contained in Paragraphs I and II of the twelfth cause of action of the amended complaint; answering paragraph III admit that defendant, Shell Oil Company, claims some interest in the lands and leases described and deny the remaining allegation thereof. In answer to Paragraph IV thereof, defendants allege that plaintiff W. B. Haney holds by assignment the rights of lessee in and to the W $\frac{1}{2}$ of the NW $\frac{1}{4}$ and the SW $\frac{1}{4}$ of Section 13, Township 8 North, Range 59 East, M.P.M., to which Lease No. Bl. 034591 has been assigned. Allege that said plaintiff W. B. Haney holds a fractional interest, 63/360ths of Government Leases No. Bl. 034165 and 034166 of the lands described in said Paragraph IV under said leases. Defendants deny that plaintiff W. B. Haney is in possession or entitled to possession of said lands.

Defendants allege that they are in possession of and claim rights in and to the property described

in said Paragraph IV by reason of the following agreements:

(Said agreements are the same and identical with agreements numbered one through eight and referred to and described in the second defense to the eleventh cause of action.)

That defendant, Montana-Dakota Utilities Co., is a successor by merger to the rights of Gas Development Company and the agreements referred to above.

Allege that said agreements are all in full force and effect and binding upon plaintiff, W. B. Haney, and deny that the claims of the defendants in and to said premises are without right, title and interest.

Except as herein specifically admitted or alleged, defendants deny each and every other allegation contained in the twelfth cause of action of the amended complaint.

Third Defense

Defendants repeat and reallege each and every allegation contained in its third defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fourth Defense

Defendants repeat and reallege each and every allegation contained in its fourth defense to the first cause of action with the same effect as if repeated at length in this paragraph.

Fifth Defense

Defendants repeat and reallege each and every allegation contained in its fifth defense to the first

cause of action with the same effect as if repeated at length in this paragraph.

Wherefore, the defendants, Fidelity Gas Co., Montana-Dakota Utilities Co. and Shell Oil Company, pray that the amended complaint herein be dismissed; that the court find that the agreements referred to in this answer are in full force and effect and that the rights of the plaintiff are subject to the terms and provisions thereof, and that the defendants recover their costs and disbursements herein.

JOHN C. BENSON
ARMIN M. JOHNSON
ARTHUR F. LAMEY

/s/ By ARTHUR F. LAMEY
Attorneys for Defendants.

Of Counsel:

Faegre & Benson

Coleman, Jameson & Lamey

Of Counsel for defendant, Shell Oil Company:

Howard M. Gullickson

[Endorsed]: Filed Sept. 5, 1953.

[Title of District Court and Cause.]

MOTION FOR LEAVE TO FILE REPLY

Come now the plaintiffs in the above action and request leave of Court to file a reply to the answer of the defendants for the reasons following:

The Complaint in this action listed several causes of action seeking to quiet title to certain lands and leases described. By their answer, defendants allege that the complaint fails to state a cause of action as their first defense to each cause of action. For their second affirmative defense to each cause of action, defendants allege that they are entitled to the possession of the lands involved and claim rights to the land by reason of (1) an operating agreement dated February 7, 1935 between the plaintiff and the defendant, Fidelity Gas Company; (2) a certain Cooperative or Unit Plan of Development dated February 7, 1935; (3) certain Gas Purchase Agreements dated May 15, 1929; and (4) an Operating Agreement dated April 10, 1951 between the defendants, Montana-Dakota Utilities Company, Fidelity Gas Company and Shell Oil Company, and that all of the agreements are in full force and effect. The third defense to each cause of action is a plea of estoppel, the fourth defense is a plea of waiver, and the fifth defense is a plea of laches.

It will be the position of the plaintiffs on the trial that the Operating Agreement, Exhibit "A" is no longer effective by reason of abandonment on the part of defendants, Fidelity Gas Company and Montana-Dakota Utilities Company. It will be the position of the plaintiffs that the Unit Plan of Development and the Gas Purchase Agreement does not give to the defendants any right to drill to sands below the Judith River Sands, if the agree-

ment is still in effect, that further it will be the position of the plaintiff that the consideration for the Unit Plan Contract and Gas Purchase Agreement has failed through the fault of the defendant, Montana-Dakota Utilities and that the agreement should be rescinded. Further, plaintiffs say that under the rules, there is doubt that abandonment could be proven without pleading abandonment specifically. Further, it seems clear that proof to support rescission is not admissible without pleading the facts upon which rescission could be based.

Further, plaintiffs believe that the issue cannot be reached without the filing of a reply.

Wherefore, plaintiffs pray for an order of this Court permitting the plaintiffs to file a reply in accordance with what is set out above.

/s/ LEIF ERICKSON

Attorney for the Plaintiffs

[Endorsed]: Filed Oct. 20, 1953.

[Title of District Court and Cause.]

ORDER TO FILE REPLY

Plaintiffs having filed a motion for leave to file a reply to the affirmative defenses in defendants' answer, and good cause appearing,

It Is Ordered, that plaintiffs serve and file a reply to the affirmative defense named in the defendants' answer within twenty (20) days after the date of this order.

Dated this 29th day of October, 1953.

/s/ W. D. MURRAY

Judge

[Endorsed]: Filed Oct. 29, 1953. Entered and noted in Civil Docket October 30, 1953.

[Title of District Court and Cause.]

REPLY

The Court having ordered a reply on motion of the plaintiffs for leave to file a reply to the affirmative matters alleged in defendants' answer, the plaintiffs in reply say:

Answer to First Cause of Action

With reference to the second defense to the first cause of action in the answer of the defendants, plaintiffs say:

I.

That the Operating Agreement, Exhibit "A" to the answer was an option granted by the plaintiffs

to the defendant, Fidelity Gas Company to drill and explore for oil and gas in the deeper sands underlying the property described in the complaint; that prior to December 1, 1937, defendant, Fidelity Gas Company, in pursuance of the option, drilled three wells on the Cedar Creek Anticline, but has drilled no wells since that time; that by the failure of the defendant, Fidelity Gas, or either of them, to drill further exploratory wells within a reasonable time after the completion of the last of the three wells referred to, the Operating Agreement, by its own terms, expired and said Operating Agreement terminated and is of no force or effect;

II.

Plaintiffs further say that if the rights of the defendants were not terminated under the said Operating Agreement, Exhibit "A" to the answer by its own terms as set out above, then the defendant, Fidelity Gas Company abandoned any right which it might have had under the Operating Agreement, Exhibit "A" prior to December 31, 1938, that said abandonment was effected as follows: Subsequent to the execution of the Operating Agreement, Exhibit "A" to the answer, defendant, Fidelity Gas Company drilled three wells on the Cedar Creek Anticline in Fallon County, Montana; the Number 1 Northern Pacific completed prior to October 22, 1936; the Warren Number 1 completed in the late summer of 1937; and the Smith Number 1 well completed prior to May, 1937; that upon the completion of the said three wells, the defendant, Fidel-

ity Gas Company drilled no more wells nor had any other wells drilled under the said Operating Agreement on the said Cedar Creek Anticline or in the vicinity thereof; that after the completion of the said three wells, officers of the defendant companies, Fidelity Gas Company and Montana-Dakota Utilities Company informed officers of the Cedar Creek Oil and Gas Company and the Mondakota Gas Company that they had abandoned any further drilling under the said Operating Agreement and any claim to rights to drill further under said Operating Agreement, and did, by reason of their failure to drill further wells under the said agreement after 1937, their statements and their conduct, abandon any rights any of the said defendants may have had under said Operating Agreement, Exhibit "A"; that therefore, if the Operating Agreement, Exhibit "A" to the answer did not expire and terminate as said in Paragraph I of the reply to the answer to the first cause of action, it terminated by abandonment as set out above and it is of no force or effect;

III.

Plaintiffs further say that if the rights of the defendants were not terminated under the said Operating Agreement, Exhibit "A" to the answer by its own terms or by abandonment as set out above, then the defendants' rights under the said Operating Agreement have been terminated by the failure of the said defendant, Fidelity Gas Company, or either of the defendants, to diligently drill and explore for oil within a reasonable time after the

completion of the three wells referred to above, that it was the duty of the defendant, Fidelity Gas Company to diligently and within a reasonable time, continue the exploration for oil in the deeper sands of the areas described in the said Operating Agreement, that subsequent to the completion of the three wells referred to above during the year 1937, the Fidelity Gas Company, neither itself or by someone else on its behalf, drilled any more oil wells on any of the lands referred to in the said Operating Agreement, and more particularly upon the lands of any of the plaintiffs herein named; that the only consideration for the said Operating Agreement was the exploration and drilling for oil to be performed on the part of the defendant, Fidelity Gas Company; that if the said Operating Agreement, Exhibit "A" to the answer did not expire by its own terms or by abandonment as said in Paragraphs I and II of the reply to the Second Defense of the Answer to the First Cause of Action by the failure of the said Fidelity Gas Company, or any of the defendants, or anyone acting on their behalf to prosecute with reasonable diligence the exploration and drilling for oil after the year 1937, said Operating Agreement, Exhibit "A" to the answer became wholly terminated, null, void and of no effect;

IV.

From prior to January 1, 1938 until after the discovery of oil in the Williston Basin and the making of the contract of April 10, 1951 between the defendants, Montana-Dakota Utilities Com-

pany, Fidelity Gas Company and Shell Oil Company, Exhibit "D" of the answer, the defendants gave no indication by conduct, by written report, by oral report or otherwise to any of these plaintiffs that the defendants, or either of them, claimed any right in any of the lands described in the complaint under the Operating Agreement, Exhibit "A" to the answer; that by reason of the failure of the defendants, or either of them during the periods from prior to January 1, 1938 until about April 10, 1951 to indicate in any manner that they claimed any rights under the said Operating Agreement, plaintiffs relying on the statement and representations and conduct of the defendant, took no affirmative steps to quiet the title of these lands or to take other appropriate steps to cancel, set aside or terminate the said Operating Agreement; that by reason of the discovery of oil in the Williston Basin, these lands have increased tremendously in value for their oil potential; that defendants took no steps to claim an interest in these lands by virtue of the Operating Agreement, Exhibit "A" to the answer until these lands had increased tremendously in value by reason of the discovery of oil in the Williston Basin as above said; and that by reason of the foregoing, defendants are estopped from claiming any right to the lands described in the complaint under the said Operating Agreement, Exhibit "A" to the answer;

V.

With respect to the Cooperative or Unit Plan of

Development, Unit No. 5, Exhibit "B" to the answer and referred to hereafter as the Gas Unit Agreement, plaintiffs say: that the consideration for the said contract has failed by reason of the wrongful conduct of the defendant, Montana-Dakota Utilities Company and that said contract should be cancelled and rescinded by the judgment of this Court for the reasons following: that the defendant, Montana-Dakota Utilities Company operates, and at all times material to this action operated an integrated pipe line system serving cities and towns in the States of Montana, North Dakota and South Dakota; that the said defendant furnishes the only market for gas produced on the lands of the plaintiffs herein described; that under the said Gas Unit Agreement, the said defendant operates all of the gas wells on the lands including those here involved committed to the Unit and determines the amount of gas to be produced from the lands committed to the agreement; that under the said Gas Unit Agreement, Exhibit "B" to the answer, the initial production of gas allocated to Unit 5, the unit in which the lands described in the complaint are located was one billion cubic feet per year; that the said defendant has, during the past five years, arbitrarily, oppressively, wrongfully and without regard to the rights of these plaintiffs, decreased the production of gas from the lands of these plaintiffs to the point where the net returns to the plaintiffs is insignificant; that said defendant, Montana-Dakota Utilities Company has constructed a pipe line from Worland, Wyoming and

entered into long term contracts with the Pure Oil Company, a corporation and others, under which it has agreed to purchase for a period of not less than twenty (20) years, gas to serve its customers formerly served with gas from the Baker-Cedar Creek field and more particularly from the lands of the plaintiffs and others in Unit 5; that in its application to the Federal Power Commission to secure a certificate of convenience and necessity to build the pipe line from Worland, Wyoming to serve its customers in Montana, North Dakota and South Dakota, it represented that it would reduce its production of gas from the Baker-Cedar Creek field of which the lands of the plaintiff are a part, to one billion five hundred thousand m.c.f. per year for the next ten years; that the said production of one billion five hundred million m.c.f. per year must be prorated over eight units in said field in addition to Unit No. 5 and to owners of deep wells not committed to any Unit Agreement; that there are ample reserves and facilities installed in the nine units of the Baker-Cedar Creek field, including Unit No. 5 to produce not less than five billion m.c.f. of gas per year; that the purpose of the defendant Montana-Dakota Utilities Company is to maintain a monopoly of gas reserves in the Cedar Creek-Baker field; that its arbitrary, oppressive, wrongful reduction in the amount of gas to be produced on the lands of these plaintiffs is in violation and disregard of the terms and the intent of the Gas Unit Agreement, Exhibit "B" to the answer, and that its arbitrary, oppressive and wrongful

reduction in the amount of gas produced and to be produced in the lands of the plaintiffs described in the complaint has resulted in the substantial failure of the consideration for the Gas Unit Agreement, Exhibit "B" to the answer, and that the said Gas Unit Agreement, Exhibit "B" is of no force or effect;

VI.

Further, with respect to the Cooperative or Unit Plan of Development, Unit No. 5 referred to as the Gas Unit Agreement, Exhibit "B" to the answer, plaintiffs says: that if the said Gas Unit Agreement, Exhibit "B" to the answer is not subject to cancellation and rescission as said above in Paragraph V, then by the terms of the said Gas Unit Agreement, Exhibit "B" to the answer, the rights of these defendants, and more particularly of the defendant, Montana-Dakota Utilities Company, are limited to the right to drill for and produce gas from the Judith River Sands underlying the lands of these plaintiffs and said Gas Unit Agreement gives to these defendants no rights to drill for or produce any hydrocarbons, whether gas, oil or otherwise, in any sands other than the Judith River Sands underlying these lands described in the complaint;

VII.

With respect to the Gas Purchase Agreements, Exhibit "C" to the answer, plaintiffs say: that said Gas Purchase Agreements, Exhibit "C" to the answer were made between the parties as a part of the general plan of operation encompassed in the Gas

Unit Agreement, Exhibit "B" to the answer; that by the terms of the Gas Purchase Contract, Exhibit "C," said Gas Purchase Contracts are in effect a part of the Gas Unit Agreement, Exhibit "B" to the answer; that for the reasons stated in Paragraph VI above, the consideration for the said Gas Purchase Contract, Exhibit "C" has failed and said Gas Purchase Contracts are no longer of any force and effect and said Gas Purchase Contracts ought to be cancelled and rescinded;

VIII.

Further, with respect to the Gas Purchase Agreement, Exhibit "C" to the answer, plaintiff states; that if the said Gas Purchase Agreements are not subject to cancellation and rescision as alleged above in Paragraph VII, said Gas Purchase Agreement, Exhibit "C" to the answer, any rights which defendants may have under said Gas Purchase Agreement, are limited to the Judith Sands.

Answer to Second Cause of Action

With respect to the second defense contained in the answer to the second cause of action, plaintiffs repeat and re-allege each and every allegation contained in its reply to the second defense stated in the answer to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to Third Cause of Action

With respect to the second defense contained in the answer to the third cause of action, plaintiffs repeat and re-allege each and every allegation con-

tained in its reply to the second defense stated in the answer to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to Fourth Cause of Action

With respect to the second defense contained in the answer to the fourth cause of action, plaintiffs repeat and re-allege each and every allegation contained in its reply to the second defense stated in the answer to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to Fifth Cause of Action

With respect to the second defense contained in the answer to the fifth cause of action, plaintiffs repeat and re-allege each and every allegation contained in its reply to the second defense stated in the answer to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to Sixth Cause of Action

With respect to the second defense contained in the answer to the sixth cause of action, plaintiffs repeat and re-allege each and every allegation contained in its reply to the second defense stated in the answer to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to Seventh Cause of Action

With respect to the second defense contained in the answer to the seventh cause of action, plaintiffs repeat and re-allege each and every allegation con-

tained in its reply to the second defense stated in the answer to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to Eighth Cause of Action

With respect to the second defense contained in the answer to the eighth cause of action, plaintiffs repeat and re-allege each and every allegation contained in its reply to the second defense stated in the answer to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to Ninth Cause of Action

With respect to the second defense contained in the answer to the ninth cause of action, plaintiffs repeat and re-allege each and every allegation contained in its reply to the second defense stated in the answer to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to Tenth Cause of Action

With respect to the second defense contained in the answer to the tenth cause of action, plaintiffs repeat and re-allege each and every allegation contained in its reply to the second defense stated in the answer to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to the Eleventh Cause of Action

With respect to the second defense contained in the answer to the eleventh cause of action, plaintiffs repeat and re-allege each and every allegation contained in its reply to the second defense stated in

the answer to the first cause of action with the same effect as if repeated at length in this paragraph.

Answer to Twelfth Cause of Action

With respect to the second defense contained in the answer to the twelfth cause of action, plaintiffs repeat and re-allege each and every allegation contained in its reply to the second defense stated in the answer to the first cause of action with the same effect as if repeated at length in this paragraph.

Wherefore, plaintiffs pray:

I.

That the Gas Unit Agreements, Exhibit "B" to the answer of the defendants to each cause of action be cancelled and rescinded and declared to be of no force or effect;

II.

That the Gas Purchase Agreements, Exhibit "C" to the answer of the defendants to each cause of action be cancelled and rescinded and declared to be of no force or effect;

III.

That judgment be entered for each of the plaintiffs against the defendants as asked in the complaint.

Dated this 10th day of November, 1953.

/s/ LEIF ERICKSON

Attorney for Plaintiffs

[Endorsed]: Filed Nov. 10, 1953.

[Title of District Court and Cause.]

ORDER

It Is Ordered and this does order that a pre-trial conference be and the same hereby is set for hearing before the Court at its courtroom in the United States Post Office building, in the city of Butte, Montana, on Tuesday, the 15th day of February, 1955, at the hour of 10:00 o'clock A. M. of said day.

It Is Further Ordered that the Clerk of this Court forthwith notify the attorneys of record for the respective parties of the making of this order.

Done and dated this 6th day of January, 1955.

/s/ W. D. MURRAY

United States District Judge

[Endorsed]: Filed Jan. 6, 1955. Entered and Noted in Civil Docket Jan. 7, 1955.

[Title of District Court and Cause.]

MINUTE ORDER

This cause came on regularly this day for hearing on pre-trial conference, Mr. Leif Erickson and Mr. J. R. Richards being present and appearing for the plaintiffs, and Mr. A. F. Lamey and Mr. Armin M. Johnson being present and appearing for the defendants, Mr. Howard M. Gullickson was present and appeared for the Shell Oil Company.

Thereupon, on motion of Mr. Lamey, Court ordered

that Mr. Charles N. Wagner be entered as associate counsel for defendant Shell Oil Company.

Thereupon, on motion of Mr. Johnson, Court ordered that Mr. Raymond Hildebrand be entered as associate counsel for defendant Montana-Dakota Utilities Company, and that Mr. Rodger L. Nordbye of Minneapolis, Minn, be admitted to practice for the purposes of this case and that his name be entered as associate counsel for the defendant Montana-Dakota Utilities Company.

Thereupon the matters to be considered at the conference were discussed by the Court and counsel, and two certain maps, marked defendants exhibits Nos. 1 and 1-A, and four copies of certain exhibits attached to the answer herein, marked defendants exhibits Nos. 2, 3, 4 and 5, were received in evidence by agreement of counsel.

Thereupon counsel for the plaintiffs were granted until March 15, 1955, within which to serve and file a trial brief herein, and counsel for the defendants were granted until March 29, 1955, within which to serve and file their trial brief, whereupon it was tentatively agreed that the cause be set for trial at Billings. Montana, on April 11, 1955.

Thereupon further hearing herein was continued until 10:00 A. M. tomorrow.

Entered in open Court at Butte, Montana, this 15th day of February, 1955.

H. H. WALKER,
Clerk.

[Title of District Court and Cause.]

MINUTE ORDER

This cause came on regularly this day for further hearing on the pre-trial conference, Mr. Leif Erickson being present and appearing for the plaintiffs, and Messrs. A. F. Lamey, Armin M. Johnson, Raymond Hildebrand and Rodger L. Nordbye being present and appearing for defendants Fidelity Gas Company and Montana-Dakota Utilities Company. Mr. Lamey also appeared for the defendant Shell Oil Company.

Thereupon a pre-trial order, as agreed upon by counsel for the respective parties after a pre-trial conference had on yesterday, was presented to the Court, whereupon said order was signed by the Court and ordered to be filed and entered.

Entered in open Court at Butte, Montana, this 16th day of February, 1955.

H. H. WALKER,
Clerk.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

At 10:00 A. M. on February 15, 1955, pursuant to notice, a pre-trial conference was held in the above action in the courtroom at Butte, Montana, plaintiffs being represented by Leif Erickson and Jerrold Richards, defendants Fidelity Gas Com-

pany and Montana-Dakota Utilities Company being represented by Raymond Hildebrand, Armin M. Johnson, and Rodger L. Nordbye, and defendant Shell Oil Company being represented by Arthur F. Lamey, Howard M. Gullickson and Charles N. Wagner.

After discussion of the pleadings and the issues raised thereby, the following agreements, by way of expediting the eventual trial of the case, were reached:

Amendment of Pleadings

1. Plaintiffs agree to eliminate any question as to the validity of the Gas Unit Agreement (Exhibit B to the answer of defendants) and the Gas Purchase Agreements; that plaintiffs' only contention with respect to such instrument is that they apply only to the Judith River Sand.

In order to effectuate this agreement, plaintiffs' Reply is amended in the following particulars:

- a. Strike all paragraph V on pages 4, 5 and 6.
- b. From paragraph VI strike the first word "further," capitalize "With" line 18 page 6; strike in lines 20, 21 and 22 page 6, the following "if the said Gas Unit Agreement, Exhibit "B" to the answer is not subject to cancellation and rescission as said above in Paragraph V, then".
- c. Strike all of paragraphs VII and VIII and in lieu thereof substitute the following "With respect to the Gas Purchase Agreements, Exhibit "C" to the answer, plaintiff say: that said Gas Purchase Agreements, Exhibit "C" to the answer were made between the parties as a part of the general plan

of operation encompassed in the Gas Unit Agreement, Exhibit "B" to the answer; that by the terms of the Gas Purchase Contract Exhibit "C" said Gas Purchase Contracts are in effect a part of the Gas Unit Agreement Exhibit "B" to the answer and any rights, if any, which defendants may have under said Gas Purchase Agreements are limited to the Judith Sands.

d. Strike from the Prayer on page 10 paragraphs I and II.

2. Plaintiffs withdraw their Prayer against "all other persons unknown" from the Amended Complaint.

Simplification of Issues

Defendants have asked plaintiffs for a clarification of their legal theories involved in paragraphs I and III of plaintiffs' Reply. Defendants have suggested that these two issues can be resolved as a matter of law and that, if this is done, the length of time needed for presentation of defendants' case can be shortened materially. In order to provide clarification and to remove any uncertainties that may exist in the case, the Court has instructed the parties to serve and file briefs setting forth their views as to the issues in the case, the evidence which they propose to offer at the trial, and the applicable law. Plaintiffs will serve and file their brief by March 15, 1955; defendants by March 29, 1955. If the briefs so filed indicate the desirability of further pre-trial procedure, it will take place on April 1, 1955 in Butte, Montana. Tentative setting for trial is April 11, 1955, in Billings, Montana.

Exhibits

With reference to Exhibits, the parties have agreed as follows:

1. The map of the Cedar Creek Anticline, introduced by defendants as Exhibit "1" in the pre-trial conference, may be admitted into evidence at the trial of this cause without further foundation.

2. Exhibits "2" and "3", as introduced by defendants at the pre-trial conference in this cause, are identical with the exhibits designated "A" and "B" attached to defendants' answer.

3. With the exception of the names and addresses of the parties, the date of execution thereof and the lands covered thereby, the instruments described as "Fidelity Operating Agreement" and "Gas Unit Agreement" in defendants' second defense to all causes of action are, for all material purposes, identical with said exhibits "2" and "3."

4. Plaintiffs, or their respective predecessors in interest, executed the "Fidelity Operating Agreement" and "Gas Unit Agreement" described in the second defense of defendants' answer to each cause of action on the dates therein indicated.

5. At the trial of this cause, exhibits "2" and "3" may be introduced into evidence by any party hereto, without objection, other than those as to relevancy and materiality.

6. The operating agreement by and between Montana-Dakota Utilities Co., Fidelity Gas Co. and Shell Oil Company, referred to in defendants' answer as exhibit "D", was executed on or about

April 10, 1951, and, as between the parties thereto, is now in full force and effect.

Evidence of Titles

7. Photostatic copies of instruments relating to title on file in county, state or federal offices shall be admissible in evidence to the same extent as the original instruments.

8. In the case of fee leases, the plaintiffs need not prove title behind the title of the lessor.

Dated this 16th day of February, 1955.

/s/ W. D. MURRAY

United States District Judge

[Endorsed]: Filed Feb. 16, 1955. Entered and Noted in Civil Docket Feb. 17, 1955.

[Title of District Court and Cause.]

NOTICE TO PRODUCE

To: Messrs. Leif Erickson and J. R. Richards
Attorneys at Law
319 Power Block
Helena, Montana

Please take notice that you are required to produce before the Court at the trial of the above entitled action, the following described documents:

1. Letter dated April 27, 1951, from Cecil W. Smith, Vice President of Defendant Montana-Dakota Utilities Co., to Plaintiff Cedar Creek Oil & Gas Co. (Exhibit No. 1 to deposition of George H. Seivers taken May 19, 1953).

2. Letter with map attached dated July 23, 1951, from Cecil W. Smith, Vice President of Defendant Montana-Dakota Utilities Co., to Plaintiff Cedar Creek Oil & Gas Co. (Exhibit No. 2 to deposition of George H. Seivers taken May 19, 1953).

3. Letter dated October 3, 1952, from R. M. Heskett, President of Defendant Montana-Dakota Utilities Co., to Plaintiff Cedar Creek Oil & Gas Company (Exhibit No. 4 to deposition of George H. Seivers taken May 19, 1953).

4. Letter dated December 23, 1952, from Cecil W. Smith, Vice President of Defendant Montana-Dakota Utilities Co., to Plaintiff Cedar Creek Oil & Gas Co. (Exhibit No. 5 to deposition of George H. Seivers taken May 19, 1953).

5. Letter dated September 12, 1952, from John Wight to Mr. George H. Seivers, Secretary-Treasurer of Plaintiff Cedar Creek Oil & Gas Company (Exhibit No. 6 to deposition of George H. Seivers taken May 19, 1953).

6. Unsigned form letter dated September 12, 1952, directed to Defendant Fidelity Gas Company and Defendant Montana-Dakota Utilities Co. (Exhibit No. 7 to deposition of George H. Seivers taken May 19, 1953).

7. Letter dated August 9, 1951, from Defendant Montana-Dakota Utilities Co., to Plaintiff Susan M. Wight (Exhibit No. 2 to deposition of John Wight taken June 11, 1953).

8. Form of notice of cancellation directed to "Montana Dakota Utility" (Exhibit No. 3 to deposition of John Wight taken June 11, 1953).

9. Letter dated September 19, 1953, from Cecil W. Smith, Vice President of Defendant Fidelity Gas Co., to Plaintiff Susan M. Wight (Exhibit No. 5 to deposition of John Wight taken June 11, 1953).

10. Letter dated April 27, 1951, from Cecil W. Smith, Vice President of Defendant Montana-Dakota Utilities Co., to Plaintiff W. B. Haney (Exhibit No. 2 to deposition of W. B. Haney taken April 9, 1953).

11. Letter with map attached dated July 23, 1951, from Cecil W. Smith, Vice President of Defendant Montana-Dakota Utilities Co., to Plaintiff W. B. Haney (Exhibit No. 3 to deposition of W. B. Haney taken April 9, 1953).

12. Letter dated December 23, 1952, from Cecil W. Smith, Vice President of Defendant Montana-Dakota Utilities Co., to Plaintiff W. B. Haney (Exhibit No. 4 to deposition of W. B. Haney taken April 9, 1953).

13. Letter dated August 6, 1952, from John Wight to Plaintiff W. B. Haney (Exhibit No. 6 to deposition of W. B. Haney taken April 9, 1953).

14. Letter dated August 8, 1952, from Plaintiff W. B. Haney to John Wight (Exhibit No. 7 to deposition of W. B. Haney taken April 9, 1953).

15. Letter dated January 21, 1952, from John Wight to Plaintiff W. B. Haney (Exhibit No. 8 to deposition of W. B. Haney taken April 9, 1953).

16. Letter dated April 27, 1951, from Cecil W. Smith, Vice President of Defendant Montana-Dakota Utilities Co., to Plaintiff Herman C. Smith

(Exhibit No. 14 to deposition of Herman C. Smith taken April 9, 1953).

17. Letter dated July 23, 1951, with map attached, from Cecil W. Smith, Vice President of Defendant Montana-Dakota Utilities Co., to Plaintiff Herman C. Smith (Exhibit No. 15 to deposition of Herman C. Smith taken April 9, 1953).

18. Letter dated December 23, 1952, from Cecil W. Smith, Vice President of Defendant Montana-Dakota Utilities Co., to Plaintiff Herman C. Smith (Exhibit No. 16 to deposition of Herman C. Smith taken April 9, 1953).

19. Letter dated August 9, 1951, from Defendant Montana-Dakota Utilities Co., to Plaintiff Herman C. Smith, (Exhibit No. 19 to deposition of Herman C. Smith taken April 9, 1953).

20. Letter dated September 13, 1953, from John Wight to Plaintiff International Trust Company (Exhibit No. 1 to deposition of Robert J. Sullivan taken April 14, 1953).

21. Unsigned letter dated September 12, 1952, from Plaintiff International Trust Company to Defendant Fidelity Gas Company and Defendant Montana-Dakota Utilities Company (Exhibit No. 2 to deposition of Robert J. Sullivan taken April 14, 1953).

22. Letter dated November 17, 1950, from John Wight to Trust Department of Plaintiff International Trust Company (Exhibit No. 3 to deposition of Robert J. Sullivan taken April 14, 1953).

23. Letter dated October 22, 1952, from R. J. Sullivan to John Wight (Exhibit No. 5 to deposition of Robert J. Sullivan taken April 14, 1953).

24. Letter dated December 23, 1952, from Cecil W. Smith, Vice President of Defendant Montana-Dakota Utilities Co., to Plaintiff International Trust Company (Exhibit No. 6 to deposition of Robert J. Sullivan taken April 14, 1953).

25. Letter dated July 12, 1951, from John Wight to Plaintiff International Trust Company (Exhibit No. 7 to deposition of Robert J. Sullivan taken April 14, 1953).

26. Unsigned cancellation notice dated July 16, 1951, from Plaintiff International Trust Company to Defendants Fidelity Gas Company and others (Exhibit No. 8 to deposition of Robert J. Sullivan taken April 14, 1953).

27. Letter dated November 1, 1937, to Thos. A. Jirik, Cedar Creek Oil & Gas Co. (Exhibit B to deposition of Cecil W. Smith taken May 19, 1953), from R. M. Heskett.

28. All letters or agreements between John Wight and the plaintiffs, or either of them, or between the plaintiffs, or anyone purporting to represent John Wight, pertaining to the commencement of this action or any other action, involving the gas purchase agreements, unit agreements, or Fidelity operating agreements referred to in the answer of defendants.

29. All letters, documents and agreements pertaining to the transfer of any interest, money or consideration between the plaintiffs or either of them and John Wight on the termination of this litigation.

In default of your production of the above, sec-

ondary evidence of the contents thereof will be offered upon the trial of this action.

Dated this 4th day of April, 1955.

FAEGRE & BENSON

COLEMAN, JAMESON & LAMEY

/s/ By COLE CROWLEY

A member of the Firm.

Attorneys for Defendants

[Endorsed]: Filed April 6, 1955.

[Title of District Court and Cause.]

SUBPOENA DUCES TECUM

To John Wight:

You are hereby commanded to appear in the United States District Court, for the District of Montana, at the Courtroom thereof in the Federal Building, in the City of Billings, Montana, on the 13th day of April, 1955, at 10 o'clock A.M. to testify on behalf of the defendants in the above entitled action and bring with you the following letters and documents:

1. Original decision of L. E. Hoffman, Chief, Division of Minerals, U. S. Department of the Interior, dated March 23, 1953, to Mondakota Gas Company, pertaining to Billings 025001. (Which is referred to in the John Wight deposition as Exhibit 1.)

2. Original letter of Montana-Dakota Util. Co. to Mrs. Susan M. Wight, dated August 9, 1951.

(Which is referred to in the John Wight deposition as Exhibit 2.)

3. Form of notice of cancellation directed to Montana-Dakota Utilities Co. and referred to as Exhibit 3 in the deposition of John Wight.

4. Original letter from Fidelity Gas Company dated Sept. 19, 1952, to Susan M. Wight. (Which is referred to in the John Wight deposition as Exhibit 5.)

5. Original letter dated November 1, 1937, from Cecil W. Smith to John Wight, giving a report on results obtained in drilling N. P. No. 1 Well and Smith's No. 1 Well in Unit No. 8, Cedar Creek Anticline.

6. Written agreement between John Wight and W. B. Haney dated about May 10, 1953, whereby John Wight will receive certain benefits in the event plaintiffs are successful in this action. (See reference at page 11 in John Wight deposition.)

7. Written agreement between John Wight and H. C. Smith whereby John Wight will receive certain benefits in the event plaintiffs are successful in this action. (See reference at page 12 in John Wight deposition.)

8. Written agreement between John Wight and Cedar Creek Oil & Gas Co. whereby John Wight will receive certain benefits in the event plaintiffs are successful in this action. (See reference at page 12 in John Wight deposition.)

9. Copy of the minutes of the Board of Direc-

tors meeting of Mondakota Gas Company held May 23, 1952. (See page 13 John Wight deposition.)

10. Written agreement between Mondakota Gas Company, John Wight (or either of them) and a Mr. Butterfield with reference to financing the conduct of the above entitled action.

11. All letters or agreements between John Wight and the plaintiffs, or either of them, or between the plaintiffs, or anyone purporting to represent John Wight, pertaining to the commencement of this action or any other action, involving the cancellation of the gas purchase agreements, unit agreements, or Fidelity operating agreements referred to in the answer of defendants.

12. All letters, documents and agreements pertaining to the transfer of any interest, money or consideration between the plaintiffs or either of them and John Wight on the termination of this litigation.

Witness, the Honorable W. D. Murray, United States District Judge, this 4th day of April, 1955.

[Seal] /s/ H. H. WALKER,
Clerk

United States of America,
District of Montana

I received this Subpoena Duces Tecum at Billings, Montana, on the 6th day of April, 1955, and on the 6th day of April, 1955, I served it on the within named John Wight by delivering to him a true copy with all endorsements thereon and tender-

ing to him the sum of \$4.00 as his fees for one day's attendance and the mileage allowed by law.

/s/ LOUIS O. ALEKSICH,

U. S. Marshal,

/s/ By J. P. JOHNSON,

Deputy

Marshal fee \$.50

Travel \$

Service \$

Total \$.50

[Endorsed]: Filed April 13, 1955.

[Title of District Court and Cause.]

MINUTE ORDER

This cause came on regularly for trial this day, Messrs. Leif Erickson and J. R. Richards being present and appearing for the plaintiffs, Mr. Arthur F. Lamey being present and appearing for all defendants, Messrs. Armin Johnson and Rodger L. Nordbye being present and appearing in behalf of defendants Fidelity Gas Company and Montana-Dakota Utilities Company, and Messrs. Howard M. Gullickson and Charles N. Wagner being present and appearing in behalf of defendant Shell Oil Company.

Thereupon an opening statement was made by Mr. Erickson, whereupon John Wight was sworn as a witness for the plaintiffs.

Thereupon certain exhibits heretofore offered and admitted in evidence at a pre-trial conference

herein, marked defendants exhibits Nos. 1, 1-A, 2, 3 and 5, were re-offered in evidence at this time by counsel for the plaintiffs and admitted without objection. Thereupon a certain exhibit which was offered and admitted in evidence at said pre-trial conference, marked defendants exhibit No. 4, was by agreement of counsel ordered withdrawn from the files, and a new exhibit marked defendants exhibit No. 3 substituted in lieu thereof.

Thereupon, on motion of counsel for the plaintiffs, Court ordered that the third and fourth causes of action contained in the amended complaint, be and are dismissed.

Thereupon a stipulation of facts as to the first and second causes of action contained in the amended complaint, with certain exhibits attached; a stipulation of facts as to the fifth and sixth causes of action contained in the amended complaint, with certain exhibits attached; and a stipulation of facts as to the seventh and eighth causes of action contained in the amended complaint, with certain exhibits attached, were ordered filed herein by agreement of counsel.

Thereupon certain documents, marked plaintiffs exhibits Nos. 6, 7, 8, 9 and 10, were offered and received in evidence without objection.

Thereupon a stipulation of facts as to the ninth and tenth causes of action contained in the amended complaint, with certain exhibits attached; and a stipulation of facts as to the eleventh and twelfth causes of action contained in the amended com-

plaint, with certain exhibits attached, were ordered filed herein by agreement of counsel.

Thereupon John Wight was examined as a witness for the plaintiffs, whereupon a certain letter dated September 28, 1935, to Jirik from Heskett, was marked as plaintiffs exhibit No. 11 for identification, but not offered in evidence at this time. Two certain letters and a certain notice of cancellation, marked respectively as plaintiffs exhibits Nos. 12, 14 and 15, were offered and received in evidence without objection, and a certain letter from Midwest Holding Company, marked plaintiffs exhibit No. 13, was offered in evidence but not admitted on objection by defendants.

Thereupon a certain oral offer of proof was made by counsel for the plaintiffs and taken into the record, whereupon counsel for defendants objected to the offer and the objection was by the Court sustained.

Thereupon, on motion of counsel for defendants, Court ordered that the certain deposition of John Wight in files herein, be opened by the Clerk and filed, whereupon the witness John Wight was interrogated with reference to certain matters contained in said deposition.

Thereupon a certain photostat copy of a letter dated July 12, 1951, marked defendants exhibit No. 16, was offered and received in evidence without objection. Three certain agreements were marked as defendants exhibits Nos. 17, 18 and 19 for identification, but were not offered in evidence at this time. A certain letter dated Sept. 12, 1952, from Wight

to Seivers, marked defendants exhibit No. 20, was offered and received in evidence over the objection of counsel for plaintiffs, and a copy of a certain letter dates Sept. 12, 1952, from Cedar Creek Oil and Gas Company to Fidelity Gas Co., et al., marked defendants exhibit No. 21, was offered and received in evidence without objection.

Thereupon further trial of the cause was ordered continued until 10:00 A. M. tomorrow.

Entered in open Court at Billings, Montana,
April 13, 1955.

H. H. WALKER,
Clerk

[Title of District Court and Cause.]

STIPULATION OF FACTS AS TO FIRST AND SECOND CAUSES OF ACTION

With respect to the first and second causes of action, it is hereby stipulated and agreed by and between plaintiff Cedar Creek Oil and Gas Company and the defendants above named as follows:

Government Leases

1. United States Oil and Gas Lease, Billings 025044-A, dated as of November 26, 1928, was issued to Jacob Edward Warren and C. J. Dousman, as lessees. A true and correct copy of said lease is attached hereto as Exhibit "1".

2. United States Oil and Gas Lease, Billings

025044-B dated as of April 12, 1930, was issued to Jacob Edward Warren and C. J. Dousman, as lessees. A true and correct copy of said lease is attached hereto as Exhibit "2".

3. Said plaintiff's claim to the land covered by leases 025044-A and 025044-B is predicated on an operating agreement dated May 18, 1927, by and between Cedar Creek Oil and Gas Company, as operator, and Jacob Edward Warren, as oil and gas prospecting permittee. A true and correct copy of said operating agreement is attached hereto as Exhibit "3".

4. On June 27, 1927, Jacob Edward Warren assigned an undivided one half interest in permit Billings 025044 to C. J. Dousman. A true and correct copy of said assignment is attached hereto as Exhibit "4".

Fee Leases

Said plaintiff's claim to the lands described in paragraph VI of the first and second cause of action is predicated on:

5. Oil and gas lease dated September 22, 1928, by and between Rush J. Hall and wife, as lessors, and Cedar Creek Oil and Gas Company, as lessee. A true and correct copy of said lease is attached hereto as Exhibit "5".

6. Oil and gas lease dated January 22, 1929, by and between W. A. Goble and wife, as lessors, and Cedar Creek Oil and Gas Company, as lessee. A

true and correct copy of said lease is attached hereto as Exhibit "6".

Dated this 13th day of April, 1955.

/s/ J. R. RICHARDS,

Attorney for plaintiff Cedar Creek
Oil and Gas Company

JOHN C. BENSON,

ARMIN M. JOHNSON,

ARTHUR F. LAMEY,

/s/ By A. F. LAMEY,

Attorneys for Defendants

[Endorsed]: Filed April 13, 1955.

[Title of District Court and Cause.]

STIPULATION OF FACTS AS TO FIFTH AND SIXTH CAUSES OF ACTION

With respect to the fifth and sixth causes of action, it is hereby stipulated and agreed between plaintiff International Trust Company and the defendants above named as follows:

1. United States Oil and Gas Lease, Billings 029521-A, dated as of November 6, 1935, was issued to Clarence W. Carter. A true and correct copy of said lease is attached hereto as Exhibit "1".

2. United States Oil and Gas Lease, Billings 029521-B, dated as of May 29, 1936, was issued to Clarence W. Carter. A true and correct copy of said lease is attached hereto as Exhibit "2".

3. Said plaintiff's claim to the lands described

in paragraph V of the fifth and sixth causes of action is predicated on assignment of the leases above described executed by Clarence W. Carter, lessee, on August 20, 1942. A true and correct copy of said assignment is attached hereto as Exhibit "3".

Dated this 13th day of April, 1955.

/s/ J. R. RICHARDS,

Attorney for Plaintiff International
Trust Company

JOHN C. BENSON,

ARMIN M. JOHNSON,

ARTHUR F. LAMEY,

/s/ By A. F. LAMEY,

Attorneys for Defendants

[Endorsed]: Filed April 13, 1955.

[Title of District Court and Cause.]

STIPULATION OF FACTS AS TO SEVENTH AND EIGHTH CAUSES OF ACTION

With respect to the seventh and eighth causes of action, it is hereby stipulated and agreed by and between plaintiff Susan M. Wight and the defendants above named as follows:

1. Said plaintiff for the purpose of this action hereby disclaims any and all interest in and to the S $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 12, Township 8 North, Range 59 East.
2. United States Oil and Gas Lease Billings

026954-A, dated as of October 24, 1935, was issued to Mildred Vinsel. A true and correct copy of said lease is attached hereto as Exhibit "1".

3. United States Oil and Gas Lease Billings 026954-B, dated as of June 23, 1936, was issued to Mildred Vinsel. A true and correct copy of said lease is attached hereto as Exhibit "2".

4. On June 18, 1931, the leases described in 4 and 5 above, were committed to the terms of an operating agreement executed by Mildred Vinsel, as prospecting permittee, and George Norbeck, as operator. A true and correct copy of said operating agreement is attached hereto as Exhibit "3".

5. Said plaintiffs claim to the leases described in 2 and 3, above, is predicated on assignment of the operating agreement described in 4, above, dated December 31, 1935, executed by George Norbeck and wife. A true and correct copy of said assignment is attached hereto as Exhibit "4".

Dated this 13th day of April, 1955.

/s/ J. R. RICHARDS,

Attorney for Plaintiff Susan M.
Wight

JOHN O. BENSON,
ARMIN M. JOHNSON,
ARTHUR F. LAMEY,

/s/ By ARTHUR F. LAMEY,
Attorneys for Defendants

[Endorsed]: Filed April 13, 1955.

[Title of District Court and Cause.]

STIPULATION OF FACTS AS TO NINTH AND TENTH CAUSES OF ACTION

With respect to the ninth and tenth causes of action, it is hereby stipulated and agreed by and between the plaintiff H. C. Smith and the defendants above named as follows:

1. United States Oil and Gas Lease Billings 029750-A, dated as of October 16, 1935, was issued to W. B. Haney. A true and correct copy of said lease is attached hereto as Exhibit "1".

2. United States Oil and Gas Lease Billings 029750-B, dated as of July 20, 1936, was issued to W. B. Haney. A true and correct copy of said lease is attached hereto as Exhibit "2".

3. Said plaintiff's claim to the leases above described is predicated on two assignments, each dated November 20, 1940, executed by W. B. Haney, lessee. True and correct copies of said assignments are attached hereto as Exhibits "3" and "4".

4. United States Consolidated Oil and Gas Lease Billings 034165-034166, dated as of August 30, 1935, subsequently changed to July 1, 1935, was issued to C. M. Adams. A true and correct copy of said lease is attached hereto as Exhibit "5".

5. On September 19, 1935, C. M. Adams and wife assigned the lease described in 4 above to Black Hills Gas and Oil Company. A true and correct copy of said assignment is attached hereto as Exhibit "6".

6. Said plaintiff's claim to the lease described in

4, above, is predicated on assignment dated October 20, 1941, executed by Black Hills Gas and Oil Company, a corporation. A true and correct copy of said assignment is attached hereto as Exhibit "7".

7. United States Oil and Gas Lease Billings 038253, covering the SE $\frac{1}{4}$ of Section 13, Township 8 North, Range 59 East, has been segregated by assignment from United States Oil and Gas Lease Billings 021056-B, dated as of October 10, 1934, issued to George Norbeck. A true and correct copy of the latter lease is attached hereto as Exhibit "8".

8. On December 10, 1934, George Norbeck and wife assigned the lease covering the land described in 9 above to Harry A. Smith. A true and correct copy of said assignment is attached hereto as Exhibit "9".

9. Said plaintiff's claim to the lease described in 6 above is predicated on assignment dated August 9, 1939, executed by Harry A. Smith and wife. A true and correct copy of said assignment is attached hereto as Exhibit "10".

Dated this 13th day of April, 1955.

/s/ J. R. RICHARDS,

Attorney for Plaintiff H. C. Smith

JOHN C. BENSON,

ARMIN M. JOHNSON,

ARTHUR F. LAMEY,

/s/ By ARTHUR F. LAMEY,

[Endorsed]: Filed April 13, 1955.

[Title of District Court and Cause.]

STIPULATION OF FACTS AS TO ELEVENTH AND TWELFTH CAUSES OF ACTION

With respect to the eleventh and twelfth causes of action, it is hereby stipulated and agreed by and between plaintiff W. B. Haney and the defendants above named as follows:

1. United States Oil and Gas Lease Billings 037591, covering the SW $\frac{1}{4}$ and W $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 13, Township 8 North, Range 59 East, has been segregated by assignment, from United States Oil and Gas Lease Billings 021056-B, dated as of October 10, 1934, issued to George Norbeck. A true and correct copy of the latter lease is attached hereto as Exhibit "1".

2. On December 10, 1934, George Norbeck and wife assigned the lease covering the land described the land in 1 above to Harry A. Smith. A true and correct copy of said assignment is attached hereto as Exhibit "2".

3. Said plaintiff's claim to the lease and lands described above is predicated on assignment dated October 24, 1945, executed by Harry A. Smith and wife. A true and correct copy of said assignment is attached hereto as Exhibit "3".

4. United States Consolidated Oil and Gas Lease Billings 034165-034166, dated as of August 30, 1935, subsequently changed to July 1, 1935, was issued to

C. M. Adams. A true and correct copy of said lease is attached hereto as Exhibit "4".

5. On September 9, 1935, C. M. Adams and wife assigned the lease described in 4 above to Black Hills Gas and Oil Company. A true and correct copy of said assignment is attached hereto as Exhibit "5".

6. On October 20, 1941, Black Hills Gas and Oil Company assigned the lease described in 4 above to Harry A. Smith and others. A true and correct copy of said assignment is attached hereto as Exhibit "6".

7. Said plaintiff's claim to the lease described in 4 above, is predicated on assignment dated October 25, 1945, executed by Harry A. Smith and wife. A true and correct copy of said assignment is attached hereto as Exhibit "7".

Dated this 13th day of April, 1955.

/s/ J. R. RICHARDS,

Attorney for Plaintiff W. B. Haney

JOHN C. BENSON,

ARMIN M. JOHNSON,

ARTHUR F. LAMEY,

/s/ By ARTHUR F. LAMEY,

Attorneys for Defendants

[Endorsed]: Filed April 13, 1955.

[Title of District Court and Cause.]

MINUTE ORDER

Counsel for respective parties present as before and trial of cause resumed.

Thereupon John Wight was recalled and examined as a witness for the plaintiffs, and three certain agreements heretofore marked for identification as defendants exhibits Nos. 17, 18 and 19, were offered and received in evidence without objection. Thereupon two certain checks, marked respectively as plaintiffs exhibits Nos. 22 and 23, were offered and received in evidence without objection. Thereupon counsel for the plaintiffs made a certain oral offer of proof, which was taken into the record, whereupon counsel for the defendants objected to the offer for reasons stated, and the objection was by the Court sustained.

Thereupon W. B. Haney was sworn and examined as a witness for the plaintiffs, and photostat copies of two certain agreements, marked respectively as plaintiffs exhibits Nos. 24 and 25, were offered and received in evidence without objection. Thereupon photostat copies of three certain letters, marked respectively as plaintiffs exhibits Nos. 26, 27 and 28, were received in evidence by stipulation of counsel.

Thereupon H. C. Smith was sworn and examined as a witness for the plaintiffs, and photostat copies of a certain agreement, of a certain cancelation notice, and of a certain letter, marked respectively as plaintiffs exhibits Nos. 29, 30 and 31, were offered

and received in evidence without objection. A certain photostat copy of a letter dated April 18, 1952, from H. C. Smith to Montana-Dakota Utilities Company, marked plaintiffs exhibit No. 32, was offered and received in evidence over the objection of counsel for the defendants.

Thereupon Thomas A. Jirik was sworn and examined as a witness for the plaintiffs, and a certain letter dated Sept. 28, 1935, to Thos. A. Jirik from R. M. Heskett, heretofore marked as plaintiffs' exhibit No. 11 for identification, was offered and received in evidence without objection. Three certain letters addressed to Thos. A. Jirik, one from Cecil W. Smith and two from R. M. Heskett, marked respectively as plaintiffs' exhibits Nos. 33, 34 and 35, were offered and received in evidence without objection. Thereupon a bundle of gas statements covering credits to account of Cedar Creek Oil and Gas Company from Montana-Dakota Utilities Company for the year 1949, marked plaintiffs' exhibit No. 36, was offered and received in evidence over the objection of counsel for the defendants.

Thereupon a certain deposition of Thomas A. Jirik was presented by counsel for the defendants, and by stipulation of counsel for all parties, said deposition was received in evidence and ordered filed, whereupon the witness Jirik was interrogated as to certain matters contained therein. A certain letter dated Sept. 29, 1952, to Fidelity Gas Company, et al., from Cedar Creek Oil and Gas Company, marked plaintiffs' exhibit No. 37, was offered and received in evidence without objection.

Thereupon George H. Seivers was sworn and examined as a witness for the plaintiffs, and a certain letter dated Jan. 25, 1952, to Cedar Creek Oil and Gas Company and signed by Cecil W. Smith, and a copy of a certain geological report dated Oct. 23, 1951, and signed by Harry A. Schroth, marked respectively as plaintiffs' exhibits Nos. 38 and 39, were offered and received in evidence over the objection of counsel for defendants. Thereupon, on motion of counsel for the defendants, the deposition of George H. Seivers, in the files of the case, was ordered to be opened and filed, whereupon the witness Seivers was interrogated as to certain matters contained therein.

Thereupon plaintiffs rested.

Thereupon Court ordered that further trial of this cause be continued until 10:00 a.m. tomorrow.

Entered in open Court at Billings, Montana, April 14, 1955.

H. H. WALKER,
Clerk

[Title of District Court and Cause.]

MINUTE ORDER

Counsel for respective parties present as before and trial of cause resumed.

Thereupon an opening statement as to defendants' case was made by Mr. Armin M. Johnson.

Thereupon Frank W. DeWolf was sworn and examined as a witness for the defendants, and a

certain map, marked defendants' exhibit No. 40, was offered and received in evidence without objection.

Thereupon Herman F. Davies was sworn and examined as a witness for the defendants, and two certain letters, marked respectively as defendants' exhibits Nos. 41 and 42, were offered and received in evidence without objection.

Thereupon Cecil W. Smith was sworn and examined as a witness for the defendants, whereupon, during the examination of said witness, counsel for defendants made a certain oral offer of proof which was taken into the record, to which offer counsel for plaintiffs objected and the objection was by the Court sustained. Thereupon certain documents, marked defendants' exhibits Nos. 43, 44, 45, 46, 47 and 48, and plaintiffs' exhibit No. 49, were offered and received in evidence without objection.

Thereupon further trial of the cause was ordered continued until 10:00 a.m. tomorrow.

Entered in open Court at Billings, Montana,
April 15, 1955.

H. H. WALKER,
Clerk

[Title of District Court and Cause.]

MINUTE ORDER

Counsel for respective parties present as before and trial of cause resumed.

Thereupon Cecil W. Smith was recalled and examined as a witness for the defendants, and four

certain letters, marked as plaintiffs' exhibits Nos. 50, 51, 52 and 53, were offered and received in evidence without objection.

Thereupon, on motion of Mr. Lamey, and by agreement of counsel for the plaintiffs, Court ordered that the witness Smith be withdrawn at this time in order to allow defendants to call another witness who desires to leave by plane for his home in Minneapolis, Minnesota.

Thereupon R. M. Heskett was sworn and examined as a witness for the defendants.

Thereupon Cecil W. Smith was recalled and further examined as a witness for the defendants, and a bundle consisting of 20 letters, marked as plaintiffs' exhibit No. 54, was offered and received in evidence over the objection of counsel for the defendants. Two photostat copies of certain assignments and one photostat copy of a certain decision approving assignment, marked respectively as defendants' exhibits Nos. 55, 56 and 57, were offered in evidence, to which offers counsel for the plaintiffs objected. Thereupon Court announced that it will reserve ruling on the admission of said exhibits in evidence. Thereupon two certain letter-agreements, marked as defendants' exhibits Nos. 58 and 59, were offered and received in evidence over the objection of counsel for the plaintiffs.

Thereupon Winston Cox and T. R. Barnes were sworn and examined as witnesses for the defendants, whereupon, during the examination of the witness Barnes, counsel for the defendants made three certain oral offers of proof, which offers were

stated and taken into the record. Thereupon counsel for the plaintiffs objected to each offer of proof as made, and the objection as made to each offer was by the Court sustained.

Thereupon E. G. Christiansen was sworn and examined as a witness for the defendants, and a certain tabulation of Shell Oil Company, chronological order of development to March 31, 1955, Cedar Creek Anticline, marked as defendants' exhibit No. 60, was offered and received in evidence without objection.

Thereupon the defendants rested.

Thereupon John Wight was recalled and examined as a witness in rebuttal, and a certain letter dated Feb. 15, 1938, to John Wight from Alger R. Syme, marked as plaintiffs' exhibit No. 61, was offered and received in evidence without objection.

Thereupon Thomas A. Jirik was recalled and examined as a witness in rebuttal, whereupon the plaintiffs rested and the evidence was closed.

Thereupon Court ordered that after receipt of a transcript from the Court Reporter, the plaintiffs be granted 45 days within which to serve and file a brief and submit proposed findings of fact and conclusions of law; that the defendants be granted 30 days, after receipt of plaintiffs' brief, within which to serve and file their brief and submit proposed findings of fact and conclusions of law; and that the plaintiffs be granted 15 days, after receipt of defendants' brief, within which to serve and file

a reply brief if so advised, whereupon the cause will be submitted and by the Court taken under advisement.

Entered in open Court at Billings, Montana,
April 16, 1955.

H. H. WALKER,
Clerk

[Title of District Court and Cause.]

PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above cause came on regularly for trial before the Honorable W. D. Murray, United States District Judge for the District of Montana, sitting without a jury at Billings, Montana, on April 13, 1955. The plaintiffs were represented by their counsel, Messrs. Leif Erickson and J. R. Richards, of Helena, Montana. All of the defendants were represented by their counsel, Mr. A. F. Lamey of Billings, Montana. The defendants, Fidelity Gas Company and Montana-Dakota Utilities Company were represented by their counsel, Messrs. Armin M. Johnson and Rodger L. Nordbye of Minneapolis, Minnesota, and the defendant, Shell Oil Company was represented by its counsel, Messrs. Charles N. Wagner and Howard N. Gullickson of Denver, Colorado. During the trial of the cause upon motion of the plaintiffs, causes of action three and four were dismissed. Evidence both oral and documentary was received by the Court in support of

the pleadings of the parties. The parties having rested, the case was submitted to the Court and taken under advisement. Counsel was given time in which to submit requested Findings of Fact and Conclusions of Law and to submit briefs in support thereof.

Now, therefore, after a consideration of all the evidence, and the Court being fully advised in the premises, the Court now makes the following,

Findings of Fact

That on November 26, 1928, United States Oil and Gas Lease Billings 025044-A was issued to Jacob Edward Warren and C. J. Dousman as lessee; that on April 12, 1930, United States Oil and Gas Lease Billings 025044-B was issued to Jacob Edward Warren and C. J. Dousman as lessees. That on May 18, 1927, plaintiff Cedar Creek Oil and Gas Company, a corporation, entered into an Operating Agreement with Jacob Edward Warren covering the lands covered by said United States Oil and Gas Leases No. 025044-A and 025044-B, said Operating Agreement having been entered into prior to the issuance of the said leases and the said Operating Agreement having been made prior to June 27, 1927 when the said Jacob Edward Warren assigned an undivided one-half interest in United States Oil and Gas Permit Billings 025044 upon which the said two leases are based. That the lands covered by said United States Oil and Gas Leases are:

The Southeast Quarter (SE $\frac{1}{4}$), the South Half

of the Northeast Quarter of the Southwest Quarter ($S\frac{1}{2}NE\frac{1}{4}SW\frac{1}{4}$), South Half of the Southwest Quarter ($S\frac{1}{2}SW\frac{1}{4}$) of Section 23, the Northeast Quarter ($NE\frac{1}{4}$) of Section 35, the North Half ($N\frac{1}{2}$), the Northwest Quarter of the Southwest Quarter ($NW\frac{1}{4}SW\frac{1}{4}$) North Half of the Northeast Quarter of the Southwest Quarter ($N\frac{1}{2}NE\frac{1}{4}SW\frac{1}{4}$) of Section 23, the North Half ($N\frac{1}{2}$) and the Southeast Quarter ($SE\frac{1}{4}$) of Section 24, the North Half of the Northwest Quarter ($N\frac{1}{2}NW\frac{1}{4}$), the Southeast Quarter of the Northwest Quarter ($SE\frac{1}{4}NW\frac{1}{4}$), the North Half of the Southeast Quarter ($N\frac{1}{2}SE\frac{1}{4}$), the Southeast Quarter of the Southeast Quarter ($SE\frac{1}{4}SE\frac{1}{4}$) of Section 25, the Northeast Quarter of the Northwest Quarter ($NENW\frac{1}{4}$) of Section 35, all in Township 8 North, Range 59 East of the Montana Principal Meridian.

That the said leases and the said Operating Agreement are still in effect and have not been cancelled or forfeited, and have not been sold, assigned or otherwise disposed of by the plaintiff, Cedar Creek Oil and Gas Company.

II.

That on September 22, 1928, an oil and gas lease was executed by and between Rush J. Hall and wife, as lessors and plaintiff, Cedar Creek Oil and Gas Company as lessee, covering:

Lots Three (3) and Four (4), the South Half of the Northwest Quarter ($S\frac{1}{2}NW\frac{1}{4}$), the Southwest Quarter ($SW\frac{1}{4}$) of Section Two

(2), all in Township 8 North, Range 59 East Montana Principal Meridian.

That the said lease is still in effect and has not been cancelled or forfeited, and has not been sold, assigned or otherwise disposed of by the plaintiff, Cedar Creek Oil and Gas Company.

III.

That on January 22, 1929, W. A. Goble and wife, as lessors, executed and delivered to plaintiff, Cedar Creek Oil and Gas Company, as lessee, an oil and gas lease covering:

The West Half ($W\frac{1}{2}$) of Section Twelve (12), Township 8 North, Range 59 East, Montana Principal Meridian.

That the said lease is still in effect and has not been cancelled or forfeited, and has not been sold, assigned or otherwise disposed of by the plaintiff, Cedar Creek Oil and Gas Company.

IV.

That on November 6, 1935, United States Oil and Gas Lease Billings 029521-A was issued to Clarence W. Carter. That on May 29, 1936, United States Oil and Gas Lease Billings 029521-B was issued to Clarence W. Carter. That on August 20, 1942, the said Clarence W. Carter and wife, as lessees, assigned said leases to the plaintiff, International Trust Company. That the lands covered by said leases are described as follows:

The South Half ($S\frac{1}{2}$) of Section Five (5) and Northeast Quarter ($NE\frac{1}{4}$), the Northeast Quarter of the Northwest Quarter ($NE\frac{1}{4}$

NW $\frac{1}{4}$), the Northeast Quarter of the Southeast Quarter (NE $\frac{1}{4}$ SE $\frac{1}{4}$) of Section 27, all in Township 8 North of Range 59 East, Montana Principal Meridian.

That the said lease is still in effect and has not been cancelled or forfeited and has not been sold, assigned or otherwise disposed of by the plaintiff, International Trust Company.

V.

That on October 24, 1935, United States Oil and Gas Lease Billings 026954-A was issued to Mildred Vinsel. That on June 23, 1936, United States Oil and Gas Lease Billings 026954-B was issued to Mildred Vinsel. That on June 18, 1931, the oil and gas prospecting permit upon which the said lease was based was committed to the terms of an Operating Agreement executed by Mildred Vinsel as prospecting permittee and George Norbeck as operator. That on December 31, 1935, said Operating Agreement was assigned by George Norbeck and wife to plaintiff, Susan M. Wight. That the lands covered by said leases are:

Lots One (1), Two (2), Three (3) and Four (4) and the East Half of the Northwest Quarter (E $\frac{1}{2}$ NW $\frac{1}{4}$) and the East Half of the Southwest Quarter (E $\frac{1}{2}$ SW $\frac{1}{4}$) of Section 30, Twn. 8 North, Range 60 East, M.P.M.

That the said leases and the said Operating Agreement are still in effect and have not been cancelled or forfeited, and have not been sold, assigned or otherwise disposed of by the plaintiff, Susan M. Wight.

VI.

That on the 10th day of October, 1934, United States Oil and Gas Lease Billings 021056-B was issued to George Norbeck. That among the lands covered by said United States Oil and Gas Lease are:

The Southeast Quarter ($SE\frac{1}{4}$) of Section 12, and the North Half of the North Half ($N\frac{1}{2}N\frac{1}{2}$) of Section 10, all in Township 8 North, Range 59 East.

That on December 31, 1935, George Norbeck and wife assigned to the plaintiff, Susan M. Wight their interest in said lease to:

The Southeast Quarter ($SE\frac{1}{4}$) of Section 12, Township 8 North, Range 59 East Montana Principal Meridian.

That on September 1, 1936, George Norbeck and wife assigned to plaintiff, Susan M. Wight, their interest under said lease to:

The North Half of the North Half ($N\frac{1}{2}N\frac{1}{2}$) of Section 10, Township 8 North, Range 59 East Montana Principal Meridian.

That the said lease is still in effect and has not been cancelled or forfeited and has not been sold, assigned or otherwise disposed of by the plaintiff, Susan M. Wight.

VII.

That on the 3rd day of June, 1931, W. A. Beck and Susie Beck, his wife, as lessors, executed an oil and gas lease to Norbeck Company, a corporation, as lessees, covering:

The East Half ($E\frac{1}{2}$) of Section 18, Township

8 North, Range 60 East Montana Principal Meridian.

That on December 31, 1935, said Norbeck Company assigned its interest in said lease as to:

The Southeast Quarter (SE $\frac{1}{4}$) of Section 18, Township 8 North, Range 60 East Montana Principal Meridian

to the plaintiff, Susan M. Wight.

That the said lease is still in effect and has not been cancelled or forfeited and has not been sold, assigned or otherwise disposed of by the plaintiff Susan M. Wight.

VIII.

That on October 16, 1935, United States Oil and Gas Lease Billings 029750-A was issued to W. B. Haney. That on July 20, 1936, United States Oil and Gas Lease Billings 029750-B was issued to W. B. Haney. That on November 20, 1940, W. B. Haney assigned his interest in said lease to plaintiff, H. C. Smith. That the lands covered by said leases and assignments are:

Lots One (1), Two (2), Three (3) and Four (4), the South Half of the North Half (S $\frac{1}{2}$ N $\frac{1}{2}$) of Section 4, Township 8 North, Range 59 East Montana Principal Meridian.

That the said lease is still in effect and has not been cancelled or forfeited and has not been sold, assigned or otherwise disposed of by the plaintiff, H. C. Smith.

IX.

That on July 1, 1935, United States Consolidated Oil and Gas Lease, Billings 034165-034166 was is-

sued to C. M. Adams. That the lease covered, among other lands:

The Northwest Quarter of the Southeast Quarter (NW $\frac{1}{4}$ SE $\frac{1}{4}$) of Section 8, and Lot One (1), and the Southeast Quarter of the Northeast Quarter (SE $\frac{1}{4}$ NE $\frac{1}{4}$) of Section 6, and Lots One (1) and Two (2) and the South Half of the Northeast Quarter (S $\frac{1}{2}$ NE $\frac{1}{4}$) and the Southeast Quarter (SE $\frac{1}{4}$) of Section 2, all in Township 8 North of Range 59 East Montana Principal Meridian.

That the said C. M. Adams and wife, on September 19, 1935, assigned their interest in the said leases as to the lands above described to the Black Hills Gas and Oil Company, a corporation. That on October 20, 1941, the Black Hills Gas and Oil Company, a corporation, assigned a 213/360ths interest in said leases, insofar as they cover the lands herein described, to the plaintiff, H. C. Smith.

That the said lease is still in effect and has not been cancelled or forfeited and has not been sold, assigned or otherwise disposed of by the plaintiff, H. C. Smith.

X.

That on October 10, 1934, United States Oil and Gas Lease Billings 021056-B was issued to George Norbeck. United States Oil and Gas Lease Billings 038253 covering:

The Southeast Quarter (SE $\frac{1}{4}$) of Section 13, Township 8 North, Range 59 East Montana Principal Meridian

has been segregated by assignment from said United States Oil and Gas Lease Billings 021056-B. That on December 10, 1934, George Norbeck and wife assigned the said lease to Harry A. Smith. That on August 9, 1939, Harry A. Smith and wife assigned their interest in said lease to the plaintiff, H. C. Smith. That the said lease is still in effect and has not been cancelled or forfeited and has not been sold, assigned or otherwise disposed of by the plaintiff, H. C. Smith.

XI.

That on October 10, 1934, United States Oil and Gas Lease Billings 021056-B was issued to George Norbeck. That United States Oil and Gas Lease Billings 037591 covering:

The Southwest Quarter (SW $\frac{1}{4}$) and the West Half of the Northwest Quarter (W $\frac{1}{2}$ NW $\frac{1}{4}$) of Section 13, Township 8 North, Range 59 East Montana Principal Meridian,

has been segregated by assignment from said United States Oil and Gas Lease Billings 021056-B. That on December 10, 1934, George Norbeck and wife assigned said United States Oil and Gas Lease to Harry A. Smith. That on October 24, 1945, Harry A. Smith and wife assigned their interest in said lease to the plaintiff, W. B. Haney. That the said lease is still in effect and has not been cancelled or forfeited and has not been sold, assigned or otherwise disposed of by the plaintiff, W. B. Haney.

XII.

That on July 1, 1935, United States Consolidated

Oil and Gas Lease Billings 034165-034166 was issued to C. M. Adams. That the said leases covered:

The Northwest Quarter of the Southeast Quarter ($NW\frac{1}{4}SE\frac{1}{4}$) of Section 8, Lot One (1) and the Southeast Quarter of the Northeast Quarter ($SE\frac{1}{4}NE\frac{1}{4}$) of Section 6, Lots One (1) and Two (2), the South Half of the Northeast Quarter ($S\frac{1}{2}NE\frac{1}{4}$) and the Southeast Quarter ($SE\frac{1}{4}$) of Section 2, all in Township 8 North of Range 59 East Montana Principal Meridian.

That on September 19, 1935, C. M. Adams and wife assigned said lease to the Black Hills Gas and Oil Company, a corporation. That on October 20, 1941, the Black Hills Gas and Oil Company, a corporation, assigned to Dr. Harry A. Smith an undivided 63/360ths interest in said lease and that on October 24, 1945, Harry A. Smith and wife assigned their interest in said lease to the plaintiff, W. B. Haney. That the said lease is still in effect and has not been cancelled or forfeited and has not been sold, assigned or otherwise disposed of by the plaintiff, W. B. Haney.

XIII.

That during the year 1935, all of the plaintiffs, or their predecessors in title entered into a certain agreement designated as an Operating Agreement with the defendant, Fidelity Gas Company, a corporation, a wholly owned subsidiary of the defendant, Montana-Dakota Utilities Company, a corporation, covering the lands set forth hereinbefore. That

except as to the dates, the description of the lands and the signatures covered by each agreement, the said agreements were identical. That the Operating Agreement covered only the sands and horizons below the 2000 foot zone. That under the terms of the said agreement, Fidelity Gas Company undertook and agreed to drill a test well on the lands involved in this litigation or on other designated lands within a period of one year and the plaintiffs, or their predecessors by said agreement, granted to the defendant, Fidelity Gas Company, an option to prosecute further drilling of wells under the agreement after the conclusion of the test well to be drilled within the one year period.

XIV.

That the defendant, Fidelity Gas Company, proceeding under the terms of the said Operating Agreement, drilled three test wells, one of the said test wells, designated as the Warren Well, being drilled upon lands involved in this litigation. That the said test well was completed and abandoned in January of 1937. That the said well was not a commercial producer and it was plugged at the time of its completion and abandonment. That the cost of drilling the said test well was paid by the defendant, Fidelity Gas Company out of money furnished to it by defendant, Montana-Dakota Utilities Company. That no further wells were drilled by the Fidelity Gas Company or the Montana-Dakota Utilities Company, or by any person or corporation acting on its behalf in the area of gas

units number 5, 6 and 7 of the Cedar Creek Anticline in Fallon County, Montana, the lands involved in this litigation being located in Units 4 and 5 of said Anticline and neither defendant, Fidelity Gas Company or defendant, Montana-Dakota Utilities Company expended any funds from January, 1937 to date, in seismic exploration, test drilling or development of the sands below the 2000 foot horizon on the lands here involved or on any lands in Unit 5 from the month of January, 1937 to date. That said Operating Agreement was terminated by the failure of the defendants, Fidelity Gas Company and Montana-Dakota Utilities Company to exercise said option.

XV.

That during the years 1937 and 1938, at various times, officers of the defendant corporations, Fidelity Gas Company and Montana-Dakota Utilities Company made oral statements to agents and officers of some of the plaintiffs that the said defendant corporations had abandoned their drilling program under the said Operating Agreement and that the said corporations, or either of them, would drill no further test wells on the lands of the plaintiffs under the said Operating Agreement and that at no time from January 1937 until April 21, 1951, did the defendants, Fidelity Gas Company and Montana-Dakota Utilities Company indicate to these plaintiffs or their predecessors that the said defendant corporations claimed any interest in the lands involved in this litigation under said Operating Agreement and the plaintiffs understood and

believed that by the failure of the defendants, Fidelity Gas Company and Montana-Dakota Utilities Company to drill further test wells, coupled with the said statements of the officers of the said corporations, that the said defendants had elected not to exercise the option to drill further test wells and to keep the said agreement alive. That upon the trial defendants offered no explanation for their delay in the period from January of 1937 until April 21, 1951 in asserting any claim of right or interest in the lands here involved by reason of said Operating Agreement, and the lapse of time in asserting said claim was unreasonable, and reasonable diligence was not exercised on the part of the defendants Fidelity Gas Company and Montana-Dakota Utilities Company in asserting said claim.

XVI.

That by reason of the failure of the defendants, Fidelity Gas Company or Montana-Dakota Utilities Company during the period from January of 1937 to April 21, 1951 to assert any claim or right under the said Operating Agreement, the plaintiffs, or their predecessors did not take any legal action to secure judicial determination that the said Operating Agreement was ineffective and that had the defendants, or either of them, during the period from January, 1937 to 1951 indicated in any manner that they claimed interest in the lands involved, plaintiffs or their predecessors would have long since filed an action to quiet title or some other appropriate action to secure judicial determination

that the said agreement was no longer in effect and the said defendants are now estopped to claim any interest under said Operating Agreement.

XVII.

That by reason of the failure of the defendants, Fidelity Gas Company or Montana-Dakota Utilities Company, or anyone acting on their behalf to drill any further test wells as provided in the Operating Agreement, the said defendants abandoned the purpose of said agreement.

XVIII.

That at approximately the same time that the Operating Agreements above referred to were executed, plaintiffs, or their predecessors entered into agreements unitizing the Judith River Sands in the lands here involved under which Unit Agreements defendant Montana-Dakota Utilities Company was designated as the Operator for the purpose of the production of natural gas from the Judith River Sands and a further agreement under which the plaintiffs or their predecessors agreed to sell the gas so produced from the Judith River Sands to the defendant, Montana-Dakota Utilities Company.

XIX.

That said Gas Unit Agreement was expressly limited by the terms of the said agreement to the Judith River Sands in the lands here involved and that the said agreement specifically provided that the said Gas Unit Agreement should create no interest or title on behalf of the defendant, Montana-Dakota Utilities Company in the lands of the plain-

tiffs and that while provision was made in said Gas Unit Agreement for the commitment of other sands here involved to similar gas Unit Agreements under conditions therein specified, none of the other sands have been committed to said agreements and it is implied in the said Gas Unit Agreement that the authority of the Montana-Dakota Utilities Company to commit any other sands to similar agreements be limited to a reasonable time. That the said Gas Unit Agreements were made in the years 1934 and 1935 and due to the lapse of time, said provision is no longer effective and the defendant, Montana-Dakota Utilities Company has no authority under the said Gas Unit Agreements to commit sands other than the Judith River Sands in the lands here involved to Unit Agreements.

XX.

That the Gas Purchase Agreements are simply agreements under which Montana-Dakota Utilities Company agrees to purchase gas produced on the lands of these plaintiffs and vests in the defendants, Montana-Dakota Utilities Company and Fidelity Gas Company no interest in the lands here involved.

XXI.

That on April 10, 1951, Montana-Dakota Utilities Company, Fidelity Gas Company and Shell Oil Company entered into an Operating Agreement under which the Shell Oil Company agreed to drill for and develop oil in the sands below 2000 feet on the lands of these plaintiffs and upon other lands.

That this Operating Agreement was neither signed nor approved by any of the plaintiffs in this action.

From the foregoing Findings of Fact, the Court makes its:

Conclusions of Law

I.

That the plaintiffs hold their respective interests on their respective lands as set forth in the Findings of Fact, free and clear of all of the claims of the defendants except for any rights held by the Montana-Dakota Utilities Company under the various Gas Unit Agreements and Gas Purchase Agreements insofar as the said agreements apply to the Judith River Sands in the lands here involved and with the exception of such rights under such agreements, none of said defendants has any right, title or interest in or to said lands, or any part thereof.

II.

That the plaintiffs are entitled to a decree as prayed for in their Complaint to quiet their title to said lands and leases against said defendants and each of them, with the exception of any claims the Montana-Dakota Utilities Company may have under said Gas Unit Agreements or said Gas Purchase Agreements to the Judith River Sands in said lands.

III.

That the plaintiffs are entitled to a judgment for

costs. And the judgment is hereby ordered to be entered accordingly.

Dated this....day of....., 1955.

.....

Judge

[Endorsed]: Lodged August 17, 1955.

[Title of District Court and Cause.]

DEFENDANTS' PROPOSED FINDINGS OF
FACT AND CONCLUSIONS OF LAW

[Defendants' Proposed Findings of Fact and Conclusions of Law are the same as those set out at pages 182-201 except for the deletion of paragraphs XIV, XV, XXII, XXIV and addition of new copy.]

[Endorsed]: Lodged September 16, 1955.

[Title of District Court and Cause.]

MEMORANDUM

The plaintiffs commenced this action to quiet title of the plaintiffs in and to certain lands and leases situated in Fallon County, State of Montana, in the District Court of the Sixteenth Judicial District of the State of Montana, in and for the County of Fallon. The action was removed to the United States District Court on the grounds of diversity of citizenship. Originally the amended

complaint contained twelve causes of action, but prior to the time of trial the third and fourth causes of action, involving the plaintiff Mondakota Gas Company, were dismissed.

Each of the remaining plaintiffs alleges two causes of action and in one the claim of the defendants, which constitutes the alleged cloud sought to be removed, is based upon a so-called lease and operating agreement, hereinafter referred to as the Fidelity Agreement. The other cause of action for each plaintiff alleges that the claim of the defendants, which constitutes the alleged cloud sought to be removed, is based upon certain unit plan of development agreements, hereinafter referred to as the Gas Unit Agreements. The complaint in each of the remaining causes of action further alleges that the plaintiffs are the owners, in the possession of, and entitled to the possession of the lands or leases described, but that the defendants and each of them claim some right in and to said lands and leases by virtue of said Fidelity Agreement and said Gas Unit Agreements above referred to. It is further alleged that the claims of the defendants are invalid and without any right whatsoever and a decree is sought quieting title to the plaintiffs in their respective lands and leases.

The defendants answered the amended complaint jointly. The first defense in the answer is that the complaint fails to state a claim upon which relief can be granted.

In the second defense in the answer the defendants deny that plaintiffs were in possession of the

lands and leases and allege that defendants are in possession under certain agreements which it is alleged are in full force and effect. The agreements under which defendants claim to be in possession of the land are, first, the said Fidelity Agreements referred to be in the plaintiffs' complaint; second, the Gas Unit Agreements referred to in plaintiffs' complaint; third, certain Gas Purchase Agreements and the operating agreement between the defendants Montana-Dakota Utilities Company, Fidelity Gas Company and Shell Oil Company. The third defense in the answer is that of estoppel, the fourth waiver, and the fifth laches.

Plaintiffs, after obtaining leave of court, filed a reply in which the validity of the agreements set forth in the answer is denied. As to the said Fidelity Agreements, it is alleged, first, said agreements expired by their terms by reason of the failure of Fidelity Gas Company to drill further exploratory wells within a reasonable time; second, if they did not so terminate, defendant Fidelity Gas Company abandoned its right under the said agreements; third, if the agreements did not terminate by their own terms and if they were not abandoned, the Fidelity Gas Company's rights terminated because it was the duty of the defendant to diligently and within a reasonable time continue exploration for oil in the deeper sands, that the only consideration for the agreement was the exploration and drilling for oil by Fidelity Gas Company; and fourth, that defendants are estopped to claim under the Fidelity Agreements. The reply also alleged certain grounds

upon which the said Gas Unit Agreements and Gas Purchase Agreements were invalid, but the validity of these agreements was removed as an issue in the case at a pre-trial conference when it was stipulated between the parties that all questions as to validity of these agreements were eliminated and plaintiffs' contention with respect to these agreements was limited to the claim that they only apply to the stratum known as the Judith River sands.

Trial was had, and the first issue to be resolved is whether or not the said Fidelity Agreements are still in full force and effect.

The lands here involved are situated upon a geological formation known as the Cedar Creek Anticline. The Cedar Creek Anticline comprises a great number of acres of land and much of it has been blocked into units for purposes of oil and gas exploration and production. The lands and leases of the plaintiffs herein are located in what is known as Unit 5. This unitization of lands on the Cedar Creek Anticline was accomplished by a series of agreements between the owners of land and the holders of private and government leases and permits on the land on the one hand, and Fidelity Gas Company and Gas Development Company on the other. The type of agreement with which are are concerned is the so-called Fidelity Agreement. All of the plaintiffs or their predecessors in interest subjected their lands or leases to this so-called operating agreement. While the lands or leases of each of the plaintiffs is subject to a different oper-

ating agreement, bearing different dates, the agreements are all the same except for the date, the parties and the description of the lands covered. In each case, Fidelity Gas Company is the second party.

One of the points of contention between the parties is whether the so-called Fidelity Agreements are, strictly speaking, merely operating agreements, or whether they are in fact subleases.

What parties label an instrument does not control in determining what the instrument actually is; if in fact they make a sublease, they do not change it by calling it an operating agreement. After first naming the parties, and describing the land, the so-called operating agreements provide:

“Now, therefore, for and in consideration of Ten Dollars (\$10.00) to it paid, and other valuable considerations, receipt whereof is hereby acknowledged by it, said first party does hereby devise and sub-lease and sub-let unto said second party all of the rights, interests and estate owned by the first party in and under the leases, permits and agreements upon all of the lands hereinabove described, with the exclusive right of possession and right to said second party to fully enjoy and use all of the rights, benefits, and privileges, belonging to the said first party, in and under said lease, permits and/or agreements, subject, however, to the covenants, conditions, terms and agreements hereinafter provided.”

This language, used by the parties, indicates their intention to make a sublease, and the Court can

find nothing in other provisions of the agreement that would require the Court to defeat the intention of the parties so expressed by construing the instrument as something other than a sublease. A sublease is a grant by a tenant of an interest in the demised premises less than his own, retaining to himself a reversion. A subletting creates a new estate, dependent upon, or carved out of, but distinct from, the original leasehold. 32 Am. Jur., Sec. 392 & 393, p. 331. All of the terms and provisions of the Fidelity Agreements taken as a whole fit these definitions of a sublease found in American Jurisprudence.

Defendants, in support of their position that the Fidelity Agreements are not subleases rely upon the Montana cases of *Aronow vs. Hill, et al.*, 87 Mont. 153, 286 Pac. 140; and *Cedar Creek Oil & Gas Co. vs. Archer*, 112. Mont. 477, 117 Pac. (2d) 265. In each of those cases it appears that the instrument with which the Court was concerned did not purport to sublease the land, as does the Fidelity Agreements here, in the language above quoted. In the *Archer* case all of the reasons which the Montana Court gave for holding the agreement there under consideration to be a drilling contract would be equally present in the case of a sublease, and the real reason for the Court's holding in that case was that the parties had not expressed an intention to make a sublease, but on the contrary clearly expressed their intention to enter into a drilling contract.

It seems clear to the Court that the Fidelity

Agreements here involved are subleases and must be considered as such. This view is strengthened by the fact that in the agreement between the defendants of April 10, 1951, by which Shell Oil Company obtained its rights in the lands in question, the defendant Fidelity Gas Company subleased and demised to Shell the rights to the lands in question under the Fidelity Agreements. If the Fidelity Agreements were merely operating agreements or drilling contracts as defendants contend, Fidelity would have no interest to sublease to Shell.

Did the Fidelity Agreements Expire by Their Own Terms

The first ground upon which plaintiffs assert the present invalidity of the Fidelity Agreements is that the agreements expired by their own terms. Plaintiffs say the agreements required Fidelity Gas Company to drill an additional test well within, at most, 18 months after the unsuccessful completion of the first test wells, and having failed to do so, the agreements expired. Defendants' position is that even if the agreements requiring the drilling of an additional test well within the 18-months period asserted by plaintiffs, which they deny, it would still have been necessary for the plaintiffs, in order for the contract to be terminated, to serve notice of forfeiture, and that no such notice of forfeiture ever having been served, the agreements are still in full force and effect.

The Fidelity Agreements are long, consisting of nine closely printed pages, and it would serve no

purpose to reproduce the entire agreement in this memorandum. The provisions of the agreement necessary to decide this feature of the case are as follows:

“2. * * * * * Provided, however, upon the surrender, cancellation, forfeiture, or other termination of the rights of second party hereunder as to all or any of the said lands; second party shall have the right to retain the exclusive possession of, and to operate, deepen, redrill, and produce any and all oil wells then drilling or being produced by it upon such lands, and as to which second party shall not be in default hereunder, with the appurtenances thereto, and the forty acre government sub-division upon which each such well is located, subject, however, to the terms of this agreement. Second party at its option may drill additional wells upon lands so retained by it. Forfeiture of all of the rights of second party as to respective lands upon which it shall be in default in the performance of the drilling, operating or producing obligations under this agreement and its failure to proceed to remedy such default within thirty (30) days after receipt of written notice from first party thereof, shall be the exclusive remedy of first party against second party on account of any such default hereunder; and default in drilling of the test well as hereinafter provided shall be deemed default as to all of the lands subject thereto.* * * * *

“3. Second party hereby agrees that as soon as practicable after the execution of this agreement and delivery by first party to second party of sat-

isfactory evidences of merchantable title to first party's lands, it will conduct a geological examination of the Cedar Creek anticline, wherein said lands are located, for the purpose of determining a location deemed favorable for drilling a well to test said structure for oil and/or gas. Said well may be located upon said lands, or upon any other lands located upon said structure. Second party will commence drilling operations for drilling such well within one year from the date of execution of operating agreements by the owners or lessees of lands within that area of the Cedar Creek anticline, located south of the north line of Section Thirty-six (36), Township Six (6) North, Range Sixty (60) East, now or formerly owned or controlled by Gas Development Company, Miller & Kennedy, D. J. Carter, Monarch Gas Corporation, or Messrs. Rehnke, McDonald and Vandervort, and George Norbeck and Norbeck Co. Said test well shall be drilled to a depth of sixty-five hundred feet, unless oil of commercial quality and quantity shall be discovered at a lesser depth, but below two thousand feet, or unless the Madison Lime Formation shall be encountered at a lesser depth. If such test well shall result in the discovery of natural gas of commercial quality and quantity at a lesser depth than 6,500 feet or above the Madison Lime Formation, such well may be completed as a gas well, at second party's option, and in that event a new test well for oil shall be drilled as soon thereafter as practicable. If said well shall be drilled into the Madison Lime Formation for a

distance of one hundred feet without encountering commercial production, or if mechanical difficulties are encountered, which make further drilling impossible, or if formations are encountered which indicate to geologists of second party that further drilling would be futile, said well may be abandoned.

“4. After completion or abandonment of said test well, second party shall have the right, at its option, to prosecute such further drilling of wells under like terms and conditions, and at such times as shall be deemed by it to be good oil field practice, having due regard that the drilling operations hereunder are purely exploratory and speculative, and also having due regard to weather and road conditions. In the event that under customary oil field practice in prospecting a wild cat area, second party shall be unable to commence the drilling of a new test well before September first of any year, the commencement of any such well may be deferred, at the option of second party, until the following first day of April.

“5. In the event that oil of commercial quality and in paying quantities is first discovered on the Cedar Creek anticline, but on lands not subject to this agreement, and located outside the area outlined in black upon the map attached hereto as Exhibit “A”, second party agrees that it will within one year after the completion of such first commercial oil well commence the drilling of a second test well at such location as will be determined upon by geologists for the second party, on some part of the

lands on said Cedar Creek anticline, located within the area of proposed Units Two (2), Three (3), Four (4) or Five (5), which well shall have for its objective the same horizon as shall have been found to be productive in the first test well. Such well shall be drilled to a depth of 6,500 feet unless oil of commercial quality and quantity or the Madison Lime Formation is encountered at a lesser depth. Second party agrees that if the said second test well is completed as a commercial well, it will prosecute in accordance with good oil field practice the further drilling of wells in the vicinity of said paying well, or wells, heretofore drilled on that part of the Cedar Creek anticline within the area outlined in black upon the map attached hereto as Exhibit "A", for the purpose of progressively extending the producing limits thereof, toward and upon the lands subject to this agreement."

It is the interpretation of Paragraph 4, above quoted, upon which the principal dispute between the parties rests. At the trial the plaintiffs sought to introduce oral testimony as to the meaning of this paragraph upon the grounds that the same was ambiguous and required an explanation. Objection to such testimony upon the ground that it would violate the parol evidence rule was sustained by the Court, but plaintiffs were granted leave to further argue the matter in written briefs, with the understanding that if the Court's opinion were changed as a result of such briefs the case would be reopened for the reception of such evidence.

Extensive arguments were submitted in plaintiffs' briefs in support of the admissibility of such evidence, but the Court remains of the opinion that Paragraph 4 is not ambiguous, needs no explanation by way of oral evidence and that such evidence was properly excluded.

The meaning of Paragraph 4 is clear when read in the light of the provisions of the contract as a whole.

By the terms of Paragraph 3, Fidelity was obligated to commence drilling a test well within one year after the execution of certain operating agreements therein specified. The depth and formation to which the well was to be drilled and the contingencies upon which it would be permissible to abandon the well were set out in detail. In the event such test well encountered commercial production, then the provisions of Paragraph 5 came into play, and Fidelity was obligation to commence drilling another well within one year after the completion of the first commercial well, and so on as in Paragraph 5 provided. Under Paragraphs 3 and 5 Fidelity Gas Company assumed definite, binding obligations as to drilling, and it is to these obligations that the forfeiture provisions of Paragraph 2 apply.

However, the situation with regard to Paragraph 4 is different. Under that paragraph, in the event that the test well proved uncommercial, Fidelity had no further binding obligation to do additional drilling, but did have the right, at its option, to drill further wells under like terms and conditions

as specified in Paragraph 3 concerning the first test well, and at such times as would be good oil field practice in a wildcat area. The phrase "under like terms and conditions", refers not to time of drilling, but to depth, formation and the conditions provided in Paragraph 3 with regard to a test well. In short, Paragraph 4 granted to Fidelity Gas Company the option to conduct further drilling operations, in the event the first test well was unsuccessful, and further provided that the option so granted must be exercised within the time after the completion of the unsuccessful test well that good oil field practice in a wild cat area would require.

This holding that Paragraph 4 granted to Fidelity an option to do further drilling within the time required by good oil field practice in a wild cat area is not founded upon the theory expressed in *Thomas vs. Standard Development Co.*, 70 Mont. 156, 224 Pac. 870, and similar cases, that all oil and gas leases are merely options; nor, in the Court's opinion, is its holding weakened by the decision in *Homestake Exploration Co. vs. Schar-egge*, 81 Mont. 604, 264 Pac. 388, that the contract there under consideration was one of lease, and not of option. The decision here reached is based upon the language which the parties here used and failed to use in the instrument, together with the reasonable inferences to be drawn therefrom.

No authority is required for the proposition that an instrument can create both a lease and an option, and that is what has been done by the so-called

Fidelity operating agreements. The plaintiffs leased, or more accurately, subleased, their lands to Fidelity Gas Company for the purpose of drilling for oil and gas upon the condition that the first test well be commenced within one year after the execution of certain agreements. In the event the first well, or any subsequent well drilled under the agreements, was a producer, Fidelity was bound to drill additional wells, at not to exceed yearly intervals, under the terms of Paragraph 5. However, in the event the first test well, or any subsequent well drilled under the agreements, was not a commercial producer, no further obligation remained for Fidelity to perform in the way of drilling; and unless Paragraph 4 be construed to be an option, Fidelity could sit back, do nothing, and forever retain the land under the agreement, because no term is otherwise provided. The forfeiture clause in Paragraph 2 would have no application to this situation, because the clause provides for notice of forfeiture only in case of default in drilling, operating or producing obligations, and as stated before, there was no obligation on Fidelity to drill, if the test well was unsuccessful. It is not reasonable to believe plaintiffs would accede to any such arrangement, and only by holding that Paragraph 4 granted an option can a reasonable result be arrived at.

Having reached the conclusion that by the terms of Paragraph 4, Fidelity Gas Company had an option to conduct further drilling on the Cedar Creek anticline, the question remains as to whether they exercised such option within the time allowed. The

evidence shows between the time of the execution of said agreements and the year 1938, three wells were drilled under said agreements by Fidelity Gas Company. In the Court's view the first of these wells constituted a compliance with the obligation imposed by Paragraph 3, while the other two were drilled under the option granted in Paragraph 4, and that the time within which additional drilling could be done under Paragraph 4 commenced to run upon cessation of the last work done on the three original wells, which, the evidence shows was July or August, 1938, when pumping tests were ended on the so-called Smith well. The evidence further shows no further drilling was done under said agreements until the Carter Oil Company well was commenced under an arrangement with Fidelity on May 12, 1941, which was plugged on January 8, 1942. From then there was no more drilling under the said agreements until a well drilled by Husky under an arrangement with Fidelity was commenced on May 13, 1949, and completed as a non-producing well some short time after July 29, 1949. The next drilling thereafter was the successful well by Shell Oil Company which was commenced on July 8, 1951, and following that successful well, Shell had drilled some 53 wells to the date of trial, all under the agreement of April 10, 1951, between Montana Dakota Utilities, Fidelity and Shell.

The time between the last work on the Smith well in July or August, 1938, and the commence-

ment of drilling the Carter well on May 12, 1941, seems to the Court to be a rather long time without any drilling being done, as does the time from January 8, 1942, when the Carter well was plugged, to May 13, 1949, when the Husky well was completed, although during part of the latter interval World War II was in progress, which would, under the terms of the contract, excuse drilling for at least a portion of the time. However, as has been stated, the time within which the option granted in Paragraph 4 was required to be exercised was within the time dictated by good oil field practice in a wild cat area. The record in the case is barren of evidence concerning good oil field practice in a wild cat area, and the Court is unable to determine whether there was a timely exercise of the option or not. Therefore, it will be necessary to reopen the case for the taking of further evidence upon this question unless decision of some of the other questions presented will dispose of the case.

Defendants have argued that negotiations which the evidence shows Fidelity carried on with California Company in 1939 or 1940 for drilling on the anticline, and its negotiations with Carter in 1940 and 1941, which culminated in the drilling of the Carter well, were sufficient to keep the operating agreements in effect. With this position the Court cannot agree, because it is apparent in this case, as in almost all similar situations, that it was drilling, not negotiations, in which the plaintiffs were interested.

Abandonment of Agreement by Fidelity

Plaintiffs' next point is that if the Fidelity Agreements did not terminate by their own terms, they were abandoned by Fidelity. As has been previously noted, it will be necessary to take further evidence as to what constitutes good oil field practice in a wild cat area as regards the time of drilling wells before it can be determined whether the agreements terminated by their own terms. However, if such evidence establishes that the agreements did not terminate, the claim of abandonment is not sustained by the evidence in this case. As recognized by both sides in their briefs, there is great confusion in the law regarding abandonment of oil and gas leases because of the failure of courts to distinguish between forfeiture and abandonment, and their tendency to use the words "abandonment" and "forfeiture" inexactly and interchangeably. However, from a review of the decisions on abandonment, it is clear that intent to abandon must be shown before abandonment can be found. In this case while there is contradicted evidence that statements were made by officials of defendants Fidelity Gas Company and Montana-Dakota Utilities Company to the effect that those companies were through with deep drilling on the Cedar Creek anticline, such evidence was unconvincing. Furthermore, there is uncontradicted evidence that all during the time when the abandonment is alleged to have taken place, Fidelity Gas Company was negotiating with various companies for the development of the anticline. These negotiations, established not

only by the testimony of officials of defendant Fidelity Gas Company, but also by testimony of disinterested employees of the concerns with whom the negotiations were had, completely negates any intent on the part of Fidelity Gas Company to abandon their agreements.

Estoppel

Because of the complexity of this case, and the great amount of work counsel have devoted to it, as evidenced by the voluminous briefs submitted, the Court, in the foregoing portion of this memorandum, has endeavored to discuss and rule upon all of the points raised. The Court feels, however, that the issues raised by defendants' defenses of estoppel, waiver and laches are decisive of the case, because whether the Fidelity Agreements had expired by their own terms, or were abandoned, the evidence shows that plaintiffs are estopped to claim the termination or abandonment of the agreements as against these defendants.

The evidence shows the defendants Montana-Dakota Utilities Company and Fidelity Gas Company transferred all of their interests in the lands in question which they held under the Fidelity Agreements and Gas Units Agreements to Shell Oil Company by an agreement dated April 10, 1951. By a letter dated April 27, 1951, from Montana-Dakota Utilities Company, the plaintiffs were advised of this agreement, and were further advised that Shell Oil Company was to proceed with drilling operations within 90 days. The plaintiffs all

agree that this letter conveyed to them the idea that Fidelity Gas Company was still claiming an interest in their lands, leases or licenses under the Fidelity Agreements. The plaintiffs Smith and Haney, and the witness Jirik, President and General Manager of Cedar Creek Oil and Gas Company, admit receiving the letter in the ordinary course of mail. The witness Wight, however, claims on behalf of plaintiffs Susan Wight and International Trust Co. that he did not see the letter of April 27, 1951, until a year after its date. However, there is no claim made that the letter was not sent to International Trust Company or Susan Wight or that they were not delivered in the ordinary course of the mail to those plaintiffs.

Despite this knowledge that Fidelity claimed rights under the Fidelity Agreements, and had subleased those rights to Shell Oil Company, and that Shell Oil Company, in reliance upon such sublease was about to undertake expensive drilling operations, these plaintiffs sat idly by and permitted Shell to proceed, until the filing of this action on February 2, 1953, by which time, due to the success of the Shell operations, the lands and leases in question had increased tremendously in value. So far as the evidence shows, none of the plaintiffs ever notified or made any claim to any of the defendants that the Fidelity Agreements had expired. The plaintiff H. C. Smith did on July 16, 1951, send by registered mail a "Notice of Cancellation" to Fidelity Gas Company, Gas Development Company and Montana-Dakota Utilities Company in

which he advised them that he "does hereby declare forfeited and cancelled any unit or option" claimed by those companies under the old operating agreements. No grounds for the forfeiture or cancellation is specified, and it would therefore, under Paragraph 2 of the Fidelity Agreements be ineffective as a notice of default. Furthermore, the very attempt to forfeit or cancel suggests that in H. C. Smith's mind, the agreement had not terminated, and only adds to the estoppel. Too, the date of this letter was about eight days after Shell had commenced drilling its first well under the agreement of April 10, 1951.

There is some additional evidence of a notice or letter of cancellation sent to Fidelity Gas Company by Cedar Creek Oil and Gas Company on September 29, 1952. However, this was well over a year after Cedar Creek, through Mr. Jirik, had learned of the Shell agreement, and by the time of that letter a number of successful wells had been completed by Shell and the lands and leases of the plaintiffs had been greatly enhanced in value.

It is also worthy of note that although plaintiffs knew that it was Shell Oil Company that was to expend its money for drilling in reliance on the validity of the Fidelity Agreements, there is no evidence that any attempt was made to notify Shell of their claims of the invalidity of the Fidelity Agreements.

Under all of the circumstances it must be held that plaintiffs are estopped to assert the termination or abandonment of the Fidelity Agreements.

As stated in 19 Am. Jur., Section 86, page 741, "the owner of a known right or title may by his representations, acts, or silence so lead another to act in the belief that the owner has waived, surrendered, or abandoned his right or title that he will be estopped from asserting it to the injury of him who has changed his position in reliance upon the owner's representations, acts, or silence." Certainly, by this silence, after knowledge of the Shell agreement, the plaintiffs have placed themselves in just this position.

It has also been suggested that under Paragraph 2 of the Agreements that defendants have kept the leases, licenses and permits of plaintiffs in force and effect by performing the obligations of the plaintiffs under those leases, licenses and permits, and that this would be another ground of estoppel. The only obligation of the plaintiffs under their various leases, licenses and permits, was the payment of various royalties and rentals, and the evidence shows that while defendants Montana-Dakota Utilities Company and Fidelity Gas Company did make payments and keep the leases, licenses and permits in effect, these payments were made under the gas unit agreements and not the operating agreements, and in fact were paid out of the plaintiffs' share of gas production from the lands involved.

In view of the disposition of the case, no discussion with reference to the admissibility of the opinion of the witness Barnes, as an expert witness, without evidence of the facts upon which

he based his opinion being in the case, is required, except to say a review of the authorities cited leaves the Court of the opinion that the evidence was properly excluded.

Dated at Butte, Montana, this 12th day of June, 1956.

/s/ W. D. MURRAY,
United States District Judge

[Endorsed]: Filed June 13, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above cause came on regularly for trial before the Honorable W. D. Murray, United States District Judge for the District of Montana, sitting without a jury at Billings, Montana, on April 13, 1955. Plaintiffs were represented by their counsel, Messrs. Leif Erickson and J. R. Richards, of Helena, Montana. All of the defendants were represented by their counsel, Mr. Arthur F. Lamey, of Billings, Montana. Defendants Fidelity Gas Co. and Montana-Dakota Utilities Co. were represented by their counsel, Messrs. Armin M. Johnson and Rodger L. Nordbye, of Minneapolis, Minnesota, and Raymond Hildebrand, of Glendive, Montana. Defendant Shell Oil Company was represented by its counsel, Messrs. Howard M. Gullickson and Charles N. Wagner, of Denver, Colorado. On motion of counsel for plaintiffs the third and fourth

causes of action of plaintiffs' amended complaint were dismissed. Oral and documentary evidence was received in support of the pleadings of the parties. The parties having rested, the case was submitted to the Court and taken under advisement. Counsel were granted time in which to submit requested findings of fact and conclusions of law and to submit briefs in support thereof.

Now, therefore, after consideration of all the evidence, and the Court being fully advised in the premises, the Court now makes the following,

Findings of Fact

I.

United States Oil and Gas Prospecting Permit Billings 025044 was issued to Jacob Edward Warren on May 31, 1924. Said permit covered the following described lands situated in Fallon County, Montana:

Township Eight (8) North, Range Fifty-nine (59) East, M.P.M.; Section Twenty-three (23): All; Section Twenty-four (24): North Half ($N\frac{1}{2}$), Southeast Quarter ($SE\frac{1}{4}$); Section Twenty-five (25): North Half Northwest Quarter ($N\frac{1}{2}NW\frac{1}{4}$), Southeast Quarter Northwest Quarter ($SE\frac{1}{4}NW\frac{1}{4}$), North Half Southeast Quarter ($N\frac{1}{2}SE\frac{1}{4}$), Southeast Quarter of the Southeast Quarter ($SE\frac{1}{4}SE\frac{1}{4}$); Section Thirty-five (35): Northeast Quarter ($NE\frac{1}{4}$), Northeast Quarter Northwest Quarter ($NE\frac{1}{4}NW\frac{1}{4}$), North Half Southeast Quarter ($N\frac{1}{2}$

SE $\frac{1}{4}$), Southeast Quarter Southeast Quarter (SE $\frac{1}{4}$ SE $\frac{1}{4}$).

On May 18, 1927, the said Jacob Edward Warren entered into an operating agreement with plaintiff Cedar Creek Oil and Gas Company, covering his interest in said permit and any resulting leases covering the above-described landed. On June 27, 1927, the said Jacob Edward Warren assigned an undivided one-half ($\frac{1}{2}$) interest in and to said permit to C. J. Dousman, subject to the terms and conditions of said operating agreement. United States Oil and Gas Leases Billings 025044-A and 025044-B, covering the lands above described, dated as of November 26, 1928, and April 12, 1930, respectively, were issued to Jacob Edward Warren and C. J. Dousman, lessees. The interest thus acquired by plaintiff Cedar Creek Oil and Gas Company is in full force and effect and has not been cancelled or forfeited, nor has it been sold, assigned or otherwise disposed of.

II.

On September 22, 1928, Rush J. Hall and Ethel Hall, as lessors, and plaintiff Cedar Creek Oil and Gas Company, as lessee, executed an oil and gas lease covering the following described property situated in Fallon County, Montana:

Township Eight (8) North, Range Fifty-nine (59) East, M.P.M.; Section Two (2): Lots Three (3), Four (4), South Half Northwest Quarter (S $\frac{1}{2}$ NW $\frac{1}{4}$), Southwest Quarter (SW $\frac{1}{4}$).

The interest thus acquired by plaintiff Cedar

Creek Oil and Gas Company is in full force and effect and has not been cancelled or forfeited, nor has it been sold, assigned or otherwise disposed of.

III.

On January 22, 1929, W. A. Goble and Fannie B. Goble, as lessors, and plaintiff Cedar Creek Oil and Gas Company, as lessee, executed an oil and gas lease covering the following described property situated in Fallon County, Montana:

Township Eight (8) North, Range Fifty-nine (59) East, M.P.M.; Section Twelve (12): West Half ($W\frac{1}{2}$).

The interest thus acquired by plaintiff Cedar Creek Oil and Gas Company is in full force and effect and has not been cancelled or forfeited, nor has it been sold, assigned or otherwise disposed of.

IV.

United States Oil and Gas Leases Billings 029521-A and Billings 029521-B, dated as of November 6, 1935, and May 29, 1936, respectively, were issued to Clarence W. Carter, Lessee, and cover the following described lands situated in Fallon County, Montana:

Township Eight (8) North, Range Fifty-nine (59) East, M.P.M.; Section Five (5): Southeast Quarter ($SE\frac{1}{4}$), Southwest Quarter ($SW\frac{1}{4}$); Section Twenty-seven (27): Northeast Quarter ($NE\frac{1}{4}$), Northeast Quarter Northwest Quarter ($NE\frac{1}{4}NW\frac{1}{4}$), Northeast Quarter Southeast Quarter ($NE\frac{1}{4}SE\frac{1}{4}$).

On August 20, 1942, the said Clarence W. Carter assigned said leases to plaintiff International Trust Company. The interest thus acquired by plaintiff International Trust Company is in full force and effect and has not been cancelled or forfeited, nor has it been sold, assigned or otherwise disposed of.

V.

United States Oil and Gas Leases Billings 026954-A and Billings 026954-B, dated as of October 24, 1935, and June 23, 1936, respectively, were issued to Mildred Vinsel, lessee, and cover the following described lands situated in Fallon County, Montana:

Township Eight (8) North, Range Sixty (60) East, M.P.M.; Section Thirty (30): Lots One (1), Two (2), Three (3), Four (4), East Half Northwest Quarter ($E\frac{1}{2}NW\frac{1}{4}$), East Half Southwest Quarter ($E\frac{1}{2}SW\frac{1}{4}$).

Prior to issuance of said leases, the said Mildred Vinsel, as prospecting permittee, and George Norbeck, as operator, entered into an operating agreement, dated June 18, 1931, covering the lands above described. On December 31, 1935, the said George Norbeck assigned all of his right, title and interest in and to said operating agreement to plaintiff Susan M. Wight. The interest thus acquired by plaintiff Susan M. Wight is in full force and effect and has not been cancelled or forfeited, nor has it been sold, assigned or otherwise disposed of.

VI.

United States Oil and Gas Lease Billings

021056-B, dated as of October 10, 1934, was issued to George Norbeck and covers, among other lands, the following described property situated in Fallon County, Montana:

Township Eight (8) North, Range Fifty-nine (59) East, M.P.M.; Section Ten (10): North Half North Half ($N\frac{1}{2}N\frac{1}{2}$); Section Twelve (12): Southeast Quarter ($SE\frac{1}{4}$).

By means of assignments dated December 31, 1935, and September 1, 1936, George Norbeck conveyed all of his right, title and interest in and to the lands above described to Susan M. Wight. The interest thus acquired by said plaintiff, with respect to oil and gas in formations below two thousand (2,000) feet, consists of, and is limited to, an undivided one-half ($\frac{1}{2}$), in that the said Norbeck had previously conveyed an undivided one-half ($\frac{1}{2}$) interest to Atlantic Pacific Oil Company of Montana by means of assignment dated October 1, 1934. Such interest of plaintiff Susan M. Wight is in full force and effect and has not been cancelled or forfeited, nor has it been sold, assigned or otherwise disposed of.

VII.

On June 3, 1931, W. A. Beck and Susie Beck, as lessors, and Norbeck Company, a corporation, as lessee, executed a lease for the sole purpose of mining and producing natural gas from, among other lands, the following described property situated in Fallon County, Montana:

Township Eight (8) North, Range Sixty

On August 20, 1942, the said Clarence W. Carter assigned said leases to plaintiff International Trust Company. The interest thus acquired by plaintiff International Trust Company is in full force and effect and has not been cancelled or forfeited, nor has it been sold, assigned or otherwise disposed of.

V.

United States Oil and Gas Leases Billings 026954-A and Billings 026954-B, dated as of October 24, 1935, and June 23, 1936, respectively, were issued to Mildred Vinsel, lessee, and cover the following described lands situated in Fallon County, Montana:

Township Eight (8) North, Range Sixty (60) East, M.P.M.; Section Thirty (30): Lots One (1), Two (2), Three (3), Four (4), East Half Northwest Quarter ($E\frac{1}{2}NW\frac{1}{4}$), East Half Southwest Quarter ($E\frac{1}{2}SW\frac{1}{4}$).

Prior to issuance of said leases, the said Mildred Vinsel, as prospecting permittee, and George Norbeck, as operator, entered into an operating agreement, dated June 18, 1931, covering the lands above described. On December 31, 1935, the said George Norbeck assigned all of his right, title and interest in and to said operating agreement to plaintiff Susan M. Wight. The interest thus acquired by plaintiff Susan M. Wight is in full force and effect and has not been cancelled or forfeited, nor has it been sold, assigned or otherwise disposed of.

VI.

United States Oil and Gas Lease Billings

021056-B, dated as of October 10, 1934, was issued to George Norbeck and covers, among other lands, the following described property situated in Fallon County, Montana:

Township Eight (8) North, Range Fifty-nine (59) East, M.P.M.; Section Ten (10): North Half North Half ($N\frac{1}{2}N\frac{1}{2}$); Section Twelve (12): Southeast Quarter ($SE\frac{1}{4}$).

By means of assignments dated December 31, 1935, and September 1, 1936, George Norbeck conveyed all of his right, title and interest in and to the lands above described to Susan M. Wight. The interest thus acquired by said plaintiff, with respect to oil and gas in formations below two thousand (2,000) feet, consists of, and is limited to, an undivided one-half ($\frac{1}{2}$), in that the said Norbeck had previously conveyed an undivided one-half ($\frac{1}{2}$) interest to Atlantic Pacific Oil Company of Montana by means of assignment dated October 1, 1934. Such interest of plaintiff Susan M. Wight is in full force and effect and has not been cancelled or forfeited, nor has it been sold, assigned or otherwise disposed of.

VII.

On June 3, 1931, W. A. Beck and Susie Beck, as lessors, and Norbeck Company, a corporation, as lessee, executed a lease for the sole purpose of mining and producing natural gas from, among other lands, the following described property situated in Fallon County, Montana:

Township Eight (8) North, Range Sixty

(60) East, M.P.M.; Section Eighteen (18): Southeast Quarter ($SE\frac{1}{4}$).

By means of assignment dated December 31, 1935, the said Norbeck Company conveyed its interest in said lease, as the same pertains to the land above described, to plaintiff Susan M. Wight. The interest thus acquired by plaintiff Susan M. Wight is in full force and effect and has not been cancelled or forfeited, nor has it been sold, assigned or otherwise disposed of.

VIII.

United States Oil and Gas Leases Billings 029750-A and Billings 029750-B, dated as of October 16, 1935, and July 20, 1936, respectively, were issued to W. B. Haney, lessee, and cover the following described lands situated in Fallon County, Montana:

Township Eight (8) North, Range Fifty-nine (59) East, M.P.M.; Section Four (4): Lots One (1), Two (2), Three (3), Four (4), South Half North Half ($S\frac{1}{2}N\frac{1}{2}$).

By means of assignment dated November 20, 1940, said W. B. Haney conveyed all of his interest in and to said leases to plaintiff H. C. Smith. The interest thus acquired by plaintiff H. C. Smith is in full force and effect and has not been cancelled or forfeited, nor has it been sold, assigned or otherwise disposed of.

IX.

United States Consolidated Oil and Gas Lease Billings 034165-034166, dated as of July 1, 1935, was issued to C. M. Adams, lessee, and covers,

among other lands, the following described property situated in Fallon County, Montana:

Township Eight (8) North, Range Fifty-nine (59) East, M.P.M.; Section Two (2): Lots One (1), Two (2), South Half Northeast Quarter ($S1\frac{1}{2}NE\frac{1}{4}$), Southeast Quarter ($SE\frac{1}{4}$); Section Six (6): Lot One (1), Southeast Quarter Northeast Quarter ($SE\frac{1}{4}NE\frac{1}{4}$); Section Eight (8): Northwest Quarter Southeast Quarter ($NW\frac{1}{4}SE\frac{1}{4}$).

On September 19, 1935, the said C. M. Adams assigned the lease above described to Black Hills Oil and Gas Company, a corporation. By means of assignment dated October 20, 1941, Black Hills Oil and Gas Company assigned an undivided $213/360$ interest in and to said lease, insofar as the same pertains to the land above described, to plaintiff H. C. Smith. The interest thus acquired by plaintiff H. C. Smith is in full force and effect and has not been cancelled or forfeited, nor has it been sold, assigned or otherwise disposed of.

X.

United States Oil and Gas Lease Billings 021056-B, dated as of October 10, 1934, was issued to George Norbeck, lessee, and covers, among other lands, the following described property situated in Fallon County, Montana:

Township Eight (8) North, Range Fifty-nine (59) East, M.P.M.; Section Thirteen (13): Southeast Quarter ($SE\frac{1}{4}$).

By means of assignment dated December 10, 1934,

the said Norbeck conveyed all of his interest in and to said lease, as the same pertains to the property above described, to Harry A. Smith. Such assigned portion has been designated United States Oil and Gas Lease Billings 038253 and was acquired by plaintiff H. C. Smith by means of assignment executed by the said Harry A. Smith on August 9, 1939. The interest thus acquired by plaintiff H. C. Smith is in full force and effect and has not been cancelled or forfeited, nor has it been sold, assigned or otherwise disposed of.

XI.

United States Oil and Gas Lease Billings 021056-B, dated as of October 10, 1934, was issued to George Norbeck, lessee, and covers, among other lands, the following described property situated in Fallon County, Montana:

Township Eight (8) North, Range Fifty-nine (59) East, M.P.M.; Section Thirteen (13): Southwest Quarter (SW $\frac{1}{4}$), West Half Northwest Quarter (W $\frac{1}{2}$ NW $\frac{1}{4}$).

By means of assignment dated December 10, 1934, the said Norbeck conveyed all of his interest in and to said lease, as the same pertains to the property above described, to Harry A. Smith. Such assigned portion has been designated United States Oil and Gas Lease Billings 037591 and was acquired by plaintiff W. B. Haney by means of assignment executed by the said Harry A. Smith on October 24, 1945. The interest thus acquired by plaintiff W. B. Haney is in full force and effect and has not been

cancelled or forfeited, nor has it been sold, assigned or otherwise disposed of.

XII.

United States Consolidated Oil and Gas Lease Billings 034165-034166, dated as of July 1, 1935, was issued to C. M. Adams, lessee, and covers, among other lands, the following described property situated in Fallon County, Montana:

Township Eight (8) North, Range Fifty-nine (59) East, M.P.M.; Section Two (2): Lots One (1), Two (2), South Half Northeast Quarter ($S\frac{1}{2}NE\frac{1}{4}$), Southeast Quarter ($SE\frac{1}{4}$); Section Six (6): Lot One (1), Southeast Quarter Northeast Quarter ($SE\frac{1}{4}NE\frac{1}{4}$); Section Eight (8): Northwest Quarter Southeast Quarter ($NW\frac{1}{4}SE\frac{1}{4}$).

On September 19, 1935, the said C. M. Adams assigned the lease above described to Black Hills Oil and Gas Company, a corporation. By means of assignment dated October 20, 1941, Black Hills Oil and Gas Company assigned an undivided 63/360 interest in and to said lease, insofar as the same pertains to the land above described, to Harry A. Smith. The interest of Harry A. Smith was acquired by plaintiff W. B. Haney by means of assignment dated October 24, 1945. The interest thus acquired by plaintiff W. B. Haney is in full force and effect and has not been cancelled or forfeited, nor has it been sold, assigned or otherwise disposed of.

XIII.

The lands hereinabove described are located on a geologic structure known as the Cedar Creek Anticline. During 1934 and 1935, all of the plaintiffs, or their predecessors in title, together with approximately 90% of the owners or oil and gas working or operating interests in lands located on the Anticline, entered into an agreement with defendant Fidelity Gas Company which has been referred to in defendants' answer, and will be referred to herein, as "Fidelity Operating Agreement." Such agreements were executed on a printed form, designated "247," and, except as to the dates, descriptions of lands and parties involved, are identical. The agreements grant and sublease to defendant Fidelity Gas Company, as operator, oil and gas working rights of plaintiffs, in the lands hereinabove described, for the purpose of conducting a cooperative exploratory and development program on the entire Cedar Creek Anticline, as a structural entity, in horizons below two thousand (2,000) feet.

XIV.

Under the terms of said Fidelity Operating Agreements Fidelity Gas Company was bound to commence drilling of a test well somewhere on the Anticline within one year after the execution of certain operating agreements. In the event said test well failed to encounter commercial production, Fidelity Gas Company, under said Fidelity Operating Agreements had the option to drill additional test wells within the time required by good

oil field practice in a wildcat area. There is no evidence in the record as to what constitutes good oil field practice in a wildcat area as regards the time between the completion of an unsuccessful well and the commencement of a new well. In the event oil of commercial quality and in paying quantities was encountered in the first or any subsequent test well drilled under the Fidelity Operating Agreement on the Cedar Creek Anticline, Fidelity Gas Company was required to commence drilling of an additional well or wells within one year from the completion of the first commercial well, and so on, with the purpose of progressively extending the production limits of said Anticline toward and upon the lands covered by each Fidelity Operating Agreement.

XV.

Acting pursuant to said agreements, Fidelity Gas Company, between 1935 and 1938, drilled three non-commercial test wells on the Cedar Creek Anticline, the last of which wells was abandoned as non-commercial in July or August, 1948. That no additional drilling was done by Fidelity Gas Company or anyone on its behalf until May, 1941, as hereafter appears.

XVI.

From September of 1935 through January of 1939 defendant Fidelity Gas Company carried on extensive negotiations with The California Company, a corporation, with the view of having the latter company participate in conducting the program initiated under the Fidelity Operating Agree-

ment for the development of the Cedar Creek Anticline, including the lands and interests of plaintiffs. After conducting a geophysical survey of an area deemed at that time as the most favorable location for a test well, The California Company concluded negotiations and rejected all proposals in January of 1939.

XVII.

Immediately after termination of negotiations with The California Company, defendant Fidelity Gas Company entered into negotiations with The Carter Oil Company, a corporation, for the purpose of having the latter company participate in conducting the program initiated under the Fidelity Operating Agreement for the development of the Cedar Creek Anticline, including the lands and interests of plaintiffs. Such negotiations culminated in agreements between the parties, executed in 1940, under the terms of which The Carter Oil Company drilled a fourth non-commercial deep test well on the Cedar Creek Anticline. Such well was commenced in May of 1941 and completed in January of 1942.

XVIII.

World War II defense demands made it difficult to obtain drilling materials fabricated from steel; particularly for the purpose of drilling test wells in a so-called "wildcat" area. Operators who were successful in obtaining steel drill pipe and well casing during said period of time did so only upon a satisfactory showing that such materials would be used in developing established productive fields near available marketing facilities.

XIX.

During 1947 negotiations were commenced by Fidelity Gas Company with J. E. Manning and others looking to further development of the Cedar Creek Anticline. These negotiations resulted in a contract with Husky Refining Company in 1947 for the purpose of having the latter company participate in conducting the program initiated under the Fidelity Operating Agreement for the development of the Cedar Creek Anticline, including the lands and interests of plaintiffs. In May of the following year Husky commenced operations on the fifth deep test well to be drilled on the Cedar Creek Anticline. Such well was completed as a dry hole in May of 1950.

XX.

Early in 1950, the three defendants herein commenced negotiations which culminated in the execution of an operating agreement on April 10, 1951, under the terms of which defendant Shell Oil Company agreed to participate in conducting the program initiated under the Fidelity Operating Agreement for the development of the Cedar Creek Anticline, including the lands and interests of plaintiffs.

XXI.

Acting pursuant to the terms of the agreement of April 10, 1951, and in reliance on the validity of the Fidelity Operating Agreements, defendant Shell Oil Company accomplished extensive geological and geophysical surveys of the Cedar Creek Anticline, and on July 8, 1951, commenced drilling

a well which in January, 1952, was completed as the first deep test well on the structure capable of producing oil in commercial quantities. Defendant Shell Oil Company has made commercial discoveries of oil to the north and south of the lands claimed by plaintiffs, has drilled more than fifty-three wells on the Cedar Creek Anticline to the time of trial and has expended approximately \$12,000,000 in conducting the program created by the Fidelity Operating Agreement.

XXII.

At no time have defendants evidenced any intention, or taken any action, to abandon their rights on the Cedar Creek Anticline under the Fidelity Operating Agreement and, specifically, said defendants have not evidenced any such intention, or taken any such action, with respect to the interests of plaintiffs which are committed to said agreement.

XXIII.

That on April 27, 1951, defendants Fidelity Gas Company and Montana-Dakota Utilities, by letter, advised all the plaintiffs of the making of the operating agreement with Shell Oil Company on April 10, 1951, and further advised them of Shell's proposed operations under said agreement; that notwithstanding their knowledge, at least, from shortly after April 27, 1951, that defendants Fidelity Gas Company and Montana-Dakota Utilities Company were claiming interests in said above described lands by virtue of the Fidelity Operating Agreements, and had subleased these interests to

Shell Oil Company, and that Shell Oil Company was preparing to spend large sums of money on the development of said Anticline in reliance upon the validity of the Fidelity Operating Agreements and the Shell Agreement with Fidelity Gas Company and Montana-Dakota Utilities Company, these plaintiffs remained silent and made no claim that the Fidelity Operating Agreement had expired or been terminated, until the filing of this action on February 2, 1953.

XXIV.

As a result of the development and other activities of the defendants, the values of oil and gas interests on the Cedar Creek Anticline, including the interests of plaintiffs herein, have been greatly enhanced.

XXV.

All of the development and other activities carried on by the defendants were performed in reliance on the fact that the Fidelity Operating Agreements covering plaintiffs' interests, and other similar interests on the Cedar Creek Anticline, were valid, subsisting and in full force and effect.

XXVI.

It was not until the value of plaintiffs' interests had been greatly enhanced, and the oil producing possibilities of their properties were demonstrated by the development work and expenditures of defendants, that any claim was made by plaintiffs to the defendants that the Fidelity Operating Agreements were no longer in effect.

XXVII.

The lands in which plaintiffs claim interests are located near the center of the Cedar Creek Anticline and if the relief prayed for in plaintiffs' amended complaint is granted, the future development for the production of oil from said structure, as now planned and carried on by defendant Shell Oil Company, will be impaired and the benefit to be derived by defendants from development of plaintiffs' lands will be lost.

XXVIII.

At no time have the plaintiffs, or any of them, served a written notice of default, upon any of the defendants, with respect to the performance of drilling, operating or producing obligations of the Fidelity Operating Agreements.

XXIX.

At approximately the same time that the Fidelity Operating Agreements were executed, as hereinabove found, plaintiffs, or their predecessors in title, entered into a Co-operative or Unit Plan of Development, Unit No. 5, Cedar Creek Anticline. While said agreement applies only to operations for the development, production and marketing of natural gas from the Judith River Sand in the lands hereinabove described, plaintiffs, or their predecessors, granted to the operator, now defendant Montana-Dakota Utilities Company, the right to commit all of their interests, including oil and gas below the Judith River Sand, to any similar unit plan of operations approved by the Secre-

tary of the Interior. Plaintiffs failed to introduce any evidence which would affect the continuing validity of such authority to unitize their interests.

XXX.

At approximately the same time that the Fidelity Operating Agreements and the Co-operative or Unit Plan of Development, Unit No. 5, were executed, plaintiffs, or their predecessors, entered into gas purchase agreements, whereby they agreed to sell, and defendant Montana-Dakota Utilities Company agreed to buy, natural gas produced from the Judith River Sand in lands committed to said Unit No. 5.

XXXI.

The terms of the Gas Purchase Agreements, Gas Unit Agreement and Fidelity Operating Agreements were discussed at a meeting in Billings, Montana, in 1934, between representatives of the United States Geological Survey, Fidelity Gas Company and associated companies and some of the predecessors in interest of plaintiffs; that thereafter said three agreements were executed by the plaintiffs, or their predecessors in interest, for the purpose of creating a comprehensive program for exploring, producing and marketing oil and gas from horizons above and below 2000 feet on the Cedar Creek Anticline.

From the foregoing Findings of Fact the Court makes the following

Conclusions of Law

I.

This Court has jurisdiction of this action.

II.

Because of the absence of evidence as to what constitutes good oil field practice in a wildcat area as regards the time for commencing drilling of an additional well after the completion of an unsuccessful well, the Court is unable to conclude whether the Fidelity Operating Agreements expired by their own terms or not.

III.

None of the rights granted Fidelity Gas Company by the Fidelity Operating Agreements have been abandoned by Fidelity Gas Company.

IV.

Plaintiffs, and each of them, are guilty of laches and barred from obtaining a judgment and decree of this Court cancelling or forfeiting the Fidelity Operating Agreements to which they have committed their respective interests.

V.

Plaintiffs, and each of them, are estopped from obtaining a judgment and decree of this Court cancelling or forfeiting the Fidelity Operating Agreements to which they have committed their respective interests.

VI.

Plaintiffs, and each of them, have waived any right to obtain a judgment and decree of this Court cancelling or forfeiting the Fidelity Operating Agreements to which they have committed their respective interests.

VII.

The Fidelity Operating Agreements, Gas Purchase Agreements and Co-operative or Unit Plan of Development, Unit No. 5, Cedar Creek Anticline, all as more fully described in the second defense of defendants' answer to all causes of action alleged in the amended complaint, are valid, subsisting and in full force and effect as between the plaintiffs and these defendants.

VIII.

Plaintiffs, and each of them, hold and own their respective interests, as defined in Findings I through XII, inclusive, subject and subordinate to all of the terms and conditions of the instruments described in the second defense of defendants' answer to all causes of action alleged in the amended complaint.

IX.

Defendants are entitled to a judgment for costs and disbursements incurred herein.

Judgment is hereby ordered to be entered accordingly.

Done and dated this 12th day June, 1956.

/s/ W. D. MURRAY

United States District Judge

[Endorsed]: Filed June 13, 1956.

[Title of District Court and Cause.]

MEMORANDUM OF COSTS AND
DISBURSEMENTS

February 25, 1953—Fees to Clerk of Court on removal—	\$15.00
Premiums on removal bonds	40.00
F. W. DeWolf—witness fee—2 days attend- ance at \$4.00 per day plus subsistence at \$5.00 per day	18.00
Mileage from out of state, 100 miles at 7c per mile	7.00
H. F. Davies—Witness fees—1 day attend- ance at \$4.00 per day plus subsistence at \$5.00 per day	9.00
Mileage from out of state	7.00
Winston Cox—Witness fees—1 day at \$4.00 per day	4.00
(Witness fees under 28 U.S.C. 1821 and Rule 70 this Court.)	
TOTAL	\$100.00

Costs taxed @ \$100.00 June 29, 1956. E. Warren
Toole, Clerk; by C. G. Kegel, Deputy.

State of Montana

County of Yellowstone—ss.

A. F. Lamey, being first duly sworn, deposes and
says: That he is the attorney for the defendants;
that he has knowledge of the facts relative to the
above costs and disbursements; that the items in
the above memorandum are correct, and have been

paid; that the said disbursements have been necessarily incurred in the said cause; and that the services charged therein have been actually and necessarily performed as therein stated.

/s/ A. F. LAMEY

Subscribed and sworn to before me this 19th day of June, 1956.

[Seal] /s/ HELEN B. SMITH

Notary Public for the State of Montana residing at Billings, Montana. My Commission expires Sept. 10, 1958.

[Endorsed]: Filed June 19, 1956.

[Title of District Court and Cause.]

NOTICE OF TAXATION OF COSTS

To: Cedar Creek Oil and Gas Company, International Trust Company, H. C. Smith, Susan M. Wight, and W. B. Haney, Plaintiffs, and Leif Erickson, 317 Power Block, Helena, Montana:

You will please take notice that on Friday, the 29th day of June, 1956, at 10:00 A.M., at Billings, Montana, application will be made to the above Court to have costs and disbursements taxed against the plaintiffs.

Dated this 18th day of June, 1956.

JOHN C. BENSON

ARMIN M. JOHNSON

RODGER NORDBYE

RAYMOND HILDEBRAND

ARTHUR F. LAMEY

/s/ By A. F. LAMEY

Attorneys for Defendants

[Endorsed]: Filed June 19, 1956.

In the United States District Court, District
of Montana, Billings Division

Civil No. 1470

CEDAR CREEK OIL AND GAS COMPANY,
a corporation; INTERNATIONAL TRUST
COMPANY, a corporation; MONDAKOTA
GAS COMPANY, a corporation; H. C.
SMITH; SUSAN M. WIGHT; and W. B.
HANEY, Plaintiffs,

vs.

FIDELITY GAS COMPANY, a corporation;
MONTANA-DAKOTA UTILITIES COM-
PANY, a corporation; and SHELL OIL
COMPANY, a corporation, Defendants.

JUDGMENT

The above cause came on regularly for trial before the Honorable W. D. Murray, United States District Judge for the District of Montana, sitting without a jury at Billings, Montana, on April 13, 1955. On motion of counsel for plaintiffs the

third and fourth causes of action of plaintiffs' amended complaint were dismissed. Oral and documentary evidence was received in support of the pleadings of the parties. The parties having rested, the case was submitted to the Court and taken under advisement; and the court having made and filed Findings of Fact and Conclusions of Law and ordered judgment to be entered accordingly,

It Is Ordered, Adjudged and Decreed that the Fidelity Operating Agreements, Gas Purchase Agreements and Co-operative or Unit Plan of Development, Unit No. 5, Cedar Creek Anticline, all as more fully described in the second defense of defendants' answer to all causes of action alleged in the amended complaint, are valid, subsisting and in full force and effect as between the plaintiffs and these defendants.

It Is Further Ordered, Adjudged and Decreed that plaintiffs, and each of them, hold and own their respective interests, as defined in Findings of Fact I through XII, inclusive, subject and subordinate to all of the terms and conditions of the instruments described in the second defense of defendants' answer to all causes of action alleged in the amended complaint.

It Is Further Ordered, Adjudged and Decreed that the defendants have judgment for their costs incurred herein in the sum of \$100.00.

Dated this 2nd day of July, 1956.

/s/ W. D. MURRAY

Judge

[Endorsed]: Filed, entered and noted in Civil Docket July 3, 1956.

[Title of District Court and Cause.]

JUDGMENT ROLL

The following documents constitute the Judgment Roll:

Petition for Removal.

Notice of Removal.

Motion of Defendants to Dismiss.

Plaintiffs' Motion to Remand.

Affidavit in Support of Motion to Remand.

Order Denying Motion to Remand.

Answer of all Defendants.

Motion for Leave to File Reply.

Order granting Leave to File Reply.

Reply.

Memorandum of Court.

Findings of Fact, Conclusions of Law and Order for Judgment.

Judgment.

United States of America

District of Montana—ss.

I, E. Warren Toole, Clerk of the United States District Court for the District of Montana, do hereby Certify that the foregoing papers hereto annexed constitute the Judgment Roll in the above-entitled action.

Witness my hand and seal of said Court this 3rd day of July, 1956.

[Seal] E. WARREN TOOLE

Clerk

/s/ By ELIZABETH C. McKEE

Deputy

[Endorsed]: Filed July 3, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: The above named Court and to the Clerk thereof, and to Fidelity Gas Company, a corporation, Montana-Dakota Utilities Company, a corporation, and Shell Oil Company, a corporation, and to John C. Benson, Armin M. Johnson, Rodger Nordbye, 1260 Northwestern Bank Building, Minneapolis 2, Minnesota, Raymond Hildebrand, Glendive, Montana and Arthur F. Lamey, 500 Electric Building, Billings, Montana, their Attorneys:

Notice is hereby given that Cedar Creek Oil and Gas Company, a corporation, International Trust Company, a corporation, H. C. Smith, Susan M. Wight and W. B. Haney, the plaintiffs above named hereby appeal to the Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 3rd day of July, 1956.

Dated this 27th day of July, 1956.

/s/ LEIF ERICKSON

Attorney for Appellants

[Endorsed]: Filed July 27, 1956.

[Title of District Court and Cause.]

UNDERTAKING ON APPEAL FOR COSTS
AND DAMAGES

Amount \$250.00.

Whereas, the Cedar Creek Oil and Gas Company the plaintiff in the above entitled action is about to appeal to the United States Court of Appeals, Ninth Circuit from a judgment entered against said plaintiff in said action in the above entitled District Court, in favor of the said defendants on the 3rd day of July 1956, for One Hundred and no/100 (\$100.00) Dollars damages and cost of suit and

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned does hereby undertake and promise, on the part of the appellant, that the said appellant will pay all damages and costs which may be awarded against it on the appeal, or on a dismissal thereof, not exceeding two hundred fifty dollars to which amount we acknowledge ourselves duly bound.

In Witness Whereof, the undersigned Surety has caused these presents by its duly authorized representative, and its corporate seal affixed at Billing, Montana, this 23rd day of July, A.D. 1956.

NATIONAL SURETY CORP.

/s/ By S. M. WEST

Attorney-in-Fact

S. M. WEST COMPANY

/s/ By S. M. WEST

Agent

[Endorsed]: Filed August 20, 1956.

[Title of District Court and Cause.]

MOTION

Appellants show to the Court as follows:

(1) Notice of Appeal to the United States Court of Appeals for the Ninth Circuit was filed herein on or about the 30th day of July, 1956;

(2) On August 21, 1956, appellants filed their Designation of Record on appeal herein;

(3) The Clerk will be unable to complete the preparation of the record on appeal herein within the 40 days from the date of filing of such Notice of Appeal for the reason that the Designation of Record was filed late, and for the reason that members of the Clerk's staff are on vacation.

Wherefore, appellants move the Court for an order extending the time within which the Record on Appeal may be filed and the appeal docketed in said Court of Appeals to September 21, 1956.

Dated this 23rd Day of August, 1956.

/s/ LEIF ERICKSON

[Endorsed]: Filed August 25, 1956.

[Title of District Court and Cause.]

ORDER

A Motion having been filed by appellants to extend the time for filing the record and docketing the appeal until September 21, 1956, and good cause appearing therefore,

It Is Ordered that the time for filing the record

and for docketing the appeal in the above entitled cause is extended until September 21, 1956.

Dated this 24th day of August, 1956.

/s/ W. D. MURRAY

Judge

[Endorsed]: Filed, entered and noted in Civil Docket August 25, 1956.

[Title of District Court and Cause.]

REQUEST FOR CERTIFICATION AND
TRANSMISSION OF RECORD PURSU-
ANT TO RULE 75 (j) OF THE FEDERAL
RULES OF CIVIL PROCEDURE

To: E. Warren Toole, Clerk of the above named
Court

The Defendants above named desire to docket in the United States Court of Appeals for the Ninth Circuit the appeal taken by Cedar Creek Oil and Gas Company, International Trust Company, H. C. Smith, Susan M. Wight and W. B. Haney, Plaintiff-Appellants, pursuant to the Notice of Appeal, filed on July 27, 1956, prior to the time the complete record on appeal is settled and certified, and therefore request pursuant to Rule 75 (j) of the Federal Rules of Civil Procedure that you certify and transmit to the United States Court of Appeals for the Ninth Circuit a copy of the following records and proceedings in the above entitled matter which are on file in your office:

1. The Amended Complaint.
 2. The Petition of the Defendants for the removal of the case from the District Court of the 16th Judicial District of the State of Montana to the United States District Court, District of Montana, Billings Division, and the Bond on Removal.
 3. Answer of Defendants Fidelity Gas Co., Montana-Dakota Utilities Co. and Shell Oil Company to the Amended Complaint.
 4. The Reply.
 5. The Pre-Trial Order, dated February 16, 1955.
 6. Plaintiff's Trial Brief, dated March 17, 1955.
 7. Memorandum and Findings of Fact and Conclusions of Law, dated June 12, 1956.
 8. Docket Entries with reference to Memorandum, Findings of Fact, Conclusions of Law and Order for Judgment, June 13, 1956.
 9. Docket Entry of June 13, 1956, relative to mailing of copies of Memorandum and Findings, etc. to Counsel.
 10. Judgment.
 11. Docket Entry with reference to Judgment.
 12. Notice of Appeal.
 13. Docket Entry with reference to Notice of Appeal.
- Dated This 28th day of August, 1956.

ARTHUR F. LAMEY
RAYMOND HILDEBRAND
JOHN C. BENSON
ARMIN M. JOHNSON
RODGER L. NORDBYE

/s/ By ARMIN M. JOHNSON

Of Counsel: Coleman, Jameson & Lamey, Faegre &
Benson. Of Counsel for Defendant, Shell Oil
Company, Howard M. Gullickson, Charles N.
Wagner.

[Endorsed]: Filed September 1, 1956.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
District of Montana—ss.

I. E. Warren Toole, Clerk of the United States District Court in and for the District of Montana, do hereby certify that the papers accompanying this certificate, except and save those consisting of minute entries, are the originals filed in Case No. 1470, Cedar Creek Oil and Gas Company, a corporation; International Trust Company, a corporation; Mondakota Gas Company, a corporation; H. C. Smith; Susan M. Wight; and W. B. Haney, Plaintiffs, vs. Fidelity Gas Company, a corporation; Montana Dakota Utilities Company, a corporation; and Shell Oil Company, a corporation, Defendants, and that those papers accompanying this certificate consisting of minute entries are full, true and com-

plete copies of the original minute entries made by said Court in said cause, and that all of said papers were designated by the respective parties as the record on appeal herein, which record on appeal consists of the following:

Petition for Removal, with Alias Summons and Amended Complaint attached thereto.

Bond on Removal.

Notice of Removal, with copy of Petition for Removal, copy of Alias Summons and of Amended Complaint attached thereto.

Motion for order extending time to appear.

Order granting time to appear.

Defendants' Motion to Dismiss.

Order of Disqualification by Judge Pray.

Stipulation for taking of deposition of Herman C. Smith, & W. B. Haney.

Order for taking of deposition of Herman C. Smith.

Motion to Remand to State Court.

Affidavit in Support of Motion to Remand.

Notice of Filing Motion to Remand.

Brief of Plaintiffs in Support of Motion to Reman.

Praecipe to add name of Howard M. Gullickson as associate counsel for defendant Shell Oil Company.

Motion of defendants for order extending time for brief.

Order granting extension of time for defendants' brief.

Stipulation for extension of time for reply brief.

Order granting additional time for reply brief.

Brief of defendants Fidelity Gas Co. and Montana-Dakota Utilities Co. in opposition to motion to remand.

Brief of Defendant Shell Oil Company in opposition to motion to remand.

Depositions of W. B. Haney and Herman C. Smith.

Stipulation for taking of depositions, of Cecil W. Smith, Thomas A. Jirik and George Seivers.

Order for Taking Depositions.

Deposition of Robert J. Sullivan.

Order denying motion to remand.

Stipulation for taking depositions of Susan M. Wight, Thomas A. Jirik, and John Wight.

Deposition of John Wight. (cover)

Deposition of Susan M. Wight.

Depositions of Cecil W. Smith and George H. Seivers.

Answer of Defendants Fidelity Gas Co., et al.

Affidavit of Mailing Answer.

Stipulation for extension of time for plaintiffs to file responsive pleadings.

Motion for Leave to File Reply.

Order to File Reply.

Depositions of R. M. Heskett and Cecil W. Smith.
Reply.

Order setting case for trial.

Order vacating setting of case for trial.

Order setting case for pre-trial conference.

Minute entry of pre-trial conference.

Minute entry of further hearing on pre-trial conference.

Pre-Trial Order.

Reporter's Notes.

Order setting case for trial.

Letter of Coleman, Jameson & Lamey for issuance of Subpoena.

Trial Brief of Defendants.

Affidavit of Mailing trial brief.

Notice to Produce.

Subpoena Duces Tecum.

Minute entry of trial. April 13, 1955.

Stipulation of Facts as to First and Second Causes of Action.

Stipulation of Facts as to Fifth and Sixth Causes of Action.

Stipulation of Facts as to Seventh and Eighth Causes of Action.

Stipulation of Facts as to Ninth and Tenth Causes of Action.

Stipulation of Facts as to Eleventh and Twelfth Causes of Action.

Deposition of John Wight.

Minute entry of trial. April 14, 1955.

Deposition of Thomas A. Jirik.

Deposition of George H. Seivers.

Minute entry of trial. April 15, 1955.

Minute entry of trial. April 16, 1955.

Reporters Notes and Transcript of Testimony, in 2 volumes.

Minute entry of Order granting plaintiffs time for brief.

Plaintiffs' Brief.

Plaintiffs' Proposed Findings of Fact and Conclusions of Law.

Brief of Defendants.

Schedule of Exhibits, and Summary of Testimony.

Affidavit of Mailing brief of defendants.

Defendants' Proposed Findings of Fact and Conclusions of Law.

Minute entry of Order extending time for plaintiffs' brief.

Minute entry of Order granting plaintiffs time for supplemental brief.

Order granting defendants time for reply brief.

Reply Brief of Defendants.

Memorandum of the Court.

Findings of Fact and Conclusions of Law and Order for Judgment.

Memorandum of Costs and Disbursements.

Notice of Taxation of Costs.

Affidavit of Mailing cost bill and notice of Taxation of costs.

Judgment.

Judgment Roll cover.

Notice of Appeal.

Undertaking on Appeal.

Appellants' Designation of Record on Appeal.

Application for extension of time for filing Record on Appeal.

Order extending time for filing Record on Appeal.

Defendants' Request for Certification and Transmission of Record on Appeal.

I further certify that Plaintiffs' Exhibits Nos, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 49, 50, 51, 52, 53, 54, and 61, and Defendants' Exhibits Nos. 1, 1A, 2, 3, 4, 5, 16, 17, 18, 19, 20, 21, 40, 41, 42, 43, 44, 45, 46, 47, 48, 55, 56, 57, 58, 59, and 60, are the originals introduced in evidence in said cause and are part of the record on appeal herein.

I further certify that the following group of papers, bearing no filing marks or exhibit numbers, and accompanying this certificate, were lodged with the Court in said cause, to-wit:

Reply Brief of Plaintiffs.

Plaintiffs Supplemental Brief.

Memorandum of Defendants for Pre-Trial Conference

Land Map, Glendive Area—Shell Oil Co., Rocky Mountain Division.

Blank Form 247, Operating Agreement.

Blank Form 250, Co-Operative or Unit Plan of Development.

Witness my hand and the seal of said Court this 8th day of September, 1956.

[Seal] /s/ E. WARREN TOOLE

Clerk as aforesaid.

[Title of District Court and Cause.]

CLERK'S SUPPLEMENTAL CERTIFICATE

United States of America,
District of Montana—ss.

I, E. Warren Toole, Clerk of the United States District Court in and for the District of Montana, do hereby certify in relation to Case No. 1470, Cedar Creek Oil and Gas Company, a corporation; International Trust Company, a corporation; Mondakota Gas Company, a corporation; H. C. Smith, Susan M. Wight; and W. B. Haney, Plaintiffs, vs. Fidelity Gas Company, a corporation; Montana Dakota Utilities Company, a corporation; and Shell Oil Company, a corporation, Defendants, that the docket entries heretofore transmitted to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit with the record on appeal in said case, were and are a full, true and complete copy of the original docket entries in said case; and further that the following were and are a full, true and complete copy of the original docket entries in said case, appearing therein under date of June 13, 1956, to-wit:

June 13, 1956—Filed Memorandum of the Court.

June 13, 1956—Filed Findings of Fact, Conclusions of Law & Order for Judgment in favor of Defendants, for costs & disbursements herein.

June 13, 1956—Mailed copies of Memorandum & Findings to counsel herein.

I further hereby certify that the "Plaintiff's

tiffs. Mr. A. F. Lamey, Billings, Montana, Attorney for all Defendants. Messrs. Armin Johnson and Rodger L. Nordbye, Minneapolis, Minnesota, Attorneys for Defendants Montana-Dakota Utilities Co. and Fidelity Gas Company. Messrs. Charles N. Wagner and Howard M. Gullickson, Casper, Wyoming, Attorneys for Defendant Shell Oil Company.

TRANSCRIPT OF EVIDENCE

The above cause came on regularly for trial before the Hon. W. D. Murray, United States District Judge for the District of Montana, sitting without a jury at Billings, Montana, on April 13, 1955. The plaintiffs were represented by their counsel, Messrs. Leif Erickson and J. R. Richards, of Helena, Montana; all the defendants were represented by their counsel, Mr. A. F. Lamey, of Billings, Montana, the defendants Fidelity Gas Company and Montana-Dakota Utilities Company were represented by their counsel, Messrs. Armin Johnson and Rodger L. Nordbye, of Minneapolis, Minnesota, and the defendant Shell Oil Company was represented by its counsel, [1]* Messrs. Charles N. Wagner and Howard M. Gullickson, of Casper, Wyoming.

Thereupon, the following proceedings were had:

Court: Number 1470, Cedar Creek Oil, vs. Fidelity Gas, are the parties ready?

Mr. Erickson: We are.

Mr. Lamey: Yes, your Honor.

Court: Very well, let's proceed.

* Page numbers appearing at foot of page of original Reporter's Transcript of Record.

Mr. Erickson: May it please the Court, in this matter there has been a pretrial conference and trial briefs have been filed, but in the view I take after my extensive study of the matter, it seems to me it might be worthwhile for the plaintiff to make an opening statement here which may involve some reference to points of law rather than evidence, but the purpose of it is to apprise the Court of the course the evidence of the plaintiffs will take. If I have the Court's permission, I would like to make a brief opening statement.

Court: Yes.

Mr. Erickson: As the Court is aware from the pretrial conference and from its examination of the pleadings and record, which has been very extensive on the part of the Court, the Court is aware this is an action in the nature of one to quiet title. Basically, the situation is this: these plaintiffs are holders of government leases and leases on privately owned lands. The instruments which the action is directed [2] against originally were two, one, the operating agreement, so designated, under which Fidelity Gas Company, a wholly owned subsidiary of Montana-Dakota Utilities, was the nominal and named lessee, or sublessee; and the other instrument is an agreement referred to as the gas unit agreement, and it covers by its terms the defendants development and operation of the gas sands in the area generally covered. In the answer, the defendants set up as a basis of their title the so-called operating agreement, and the Court is aware from its study of this it is a little difficult to keep all the

agreements separated, but the operating agreement is the agreement with Fidelity Gas Company. It is the only one in which Fidelity Gas is a party. In addition, the defendants set up as the basis for their claim of interest certain gas purchase agreements, and those various agreements have been covered by the pretrial order and are a part of the file. Now, it is the position of the plaintiffs that the only one of these instruments which purported to give any interest to these defendants is the so-called operating agreement, or Fidelity Gas agreements. Those agreements were negotiated with different owners, so don't bear the same date, but they were made somewhere along in 1934. Under the terms of that agreement, which I must say in many regards is most vague, an agreement which we will point out was prepared by the defendant Fidelity Gas, and printed by the Fidelity Gas, and Fidelity Gas then being responsible [3] for any ambiguities that may be in the instrument; the instrument was signed by a number of holders of Federal leases and fee leases, including these plaintiffs. Now, the primary purpose of the agreement, as indicated by Paragraphs 2 and 3 of the agreement——

Court: Of the operating agreement?

Mr. Erickson: Yes.

Court: I have it here.

Mr. Erickson: Yes, that is what I am referring to. The Fidelity Gas Company assumed an obligation to drill test wells as provided in this agreement. That was a definite promise, a definite obligation, an enforceable obligation on the part of Fidel-

ity Gas under the terms of the agreement. It was provided that the test well might be drilled on the southern end, and on this portion of the whole Cedar Creek Anticline (indicating). I think the Court is familiar with the map, and this general area. This is south, of course. The Unit 5 I represent is up in here (indicating). The contract provided the first test well might be drilled down in these lower units. A well was drilled there in 1937. After the first well was drilled, which is the N.P. Number 1, it is called, Fidelity Gas drilled a well on one of the properties here involved in Unit 5. I think there is some doubt as to the completion date, but the completion date was approximately the middle of January, 1937. That well was dry. There was some small production down [4] below there. We agree that the two wells and a subsequent one drilled at about the same time in the lower end were drilled pursuant to the Fidelity Gas agreement, satisfying the obligation of Fidelity insofar as drilling those wells is concerned.

The next important feature of the contract is Paragraph 4, and on Paragraph 4, the plaintiffs' case largely rests. Paragraph 4 of the Fidelity agreement says, "After completion or abandonment of said test well, second party shall have the right, at its option, to prosecute such further drilling of wells under like terms and conditions, and at such times as shall be deemed by it to be good oil field practice," and so forth, and concluding with the sentence, "In the event that under customary oil field practice in prospecting a wild cat area, second

party shall be unable to commence the drilling of a new test well before September 1st of any year, the commencement of any such well may be deterred, at the option of second party, until the following first day of April." Now, it will be the position of the plaintiffs that this was the manner and means by which Fidelity Gas could have kept the contract alive after the first year, by proceeding with test drilling after the termination of the first year; that they did not drill any more test wells after that time, and particularly within the period which under Section 4 we think is contemplated, a year, or if it happens to run into September, a matter of 18 months. That is basically our position insofar as this contract is concerned, [5] that the contract ipso facto terminated by its own terms at the end of the second year, or 18 months, when no new test well was drilled, and our testimony will show no new test well was drilled.

Anticipating, by reason of the trial brief of the defendants, just a little bit, the trial brief indicates the defendants take the view that this is not a lease or sublease, and doesn't come within the rule often announced by the Montana Court and all Courts that in the case of these agreements dealing with oil and gas, where one party is bound to perform, and the other has only an option, that forfeiture is favored. The defendants have argued that this is not the type of instrument which comes within that general rule. We would like to point out to the Court at the outset, at the top of page 2, and this is the language which is furnished by the defendant Fi-

delity Gas, it is its contract, and it specifically says, "The first party"—that is our plaintiffs insofar as this is concerned—"does hereby devise and sublease and sublet unto said second party" and so on. Further, there is reference to the lessor in the contract, and we believe in the light of the language used by the defendant Fidelity Gas, which we think is binding on M.D.U., that they would be now estopped to come in and contend that this is other than a lease or sublease, and we believe the terms of the agreement show it is a sublease and intended to be that. [6]

Further, it would appear that the defendants' position is and will be that once they drilled the first test well on this property in the first year, from then on they had an interest in this land that lasted into perpetuity, that being done, that they had no further obligation to do anything further. The contract, which we say is prepared by the defendant Fidelity Gas has no term, a most unusual contract. Most of them have a provision that the contract shall run so long as oil and gas is produced. Nothing of that sort appears in this contract. We have to look to the fact that it is a lease, and look to Paragraph 4 to get some idea of what the lease is really intended to do.

Anticipating further the position of the defendants, as revealed by their pleadings, and by their brief, the defendants take the position that the lease can only be terminated by a declaration of forfeiture under Paragraph 2. It is about the eighth or ninth line above the bottom of the paragraph, "For-

feiture of all of the rights of second party as to respective lands upon which it shall be in default in the performance of the drilling, operating or producing obligations under this agreement, and its failure to proceed to remedy such default within 30 days after receipt of written notice from first party thereof, shall be the exclusive remedy of first party against second party on account of any such default hereunder." Now, it is our position that that forfeiture clause has relation [7] only to the obligation to drill the first test well; then if there is a discovery of oil or gas in paying quantities, then comes into being the obligation on the part of the Fidelity Gas to operate and produce, and the forfeiture clause, in the view we take, has application only to those obligations that were assumed by Fidelity, and we say as to drilling further test wells after the first one was dry, there was no obligation on the part of Fidelity to do anything. They could just walk off and leave it, and we say they did. They couldn't be in default, there was no default to declare, they hadn't assumed to do anything but drill the first well, which they did. We want to call, also, the Court's attention to the fact there are several provisions in the contract permitting Fidelity to surrender all its interests, and it is a situation covered by the numerous cases which we have cited to the Court on the matter of forfeiture and on the matter of options, and that will be developed more fully in briefs which we hope to be permitted to file later.

Now, with reference to the Unit Agreement,

which has been designated, I think, now as Exhibit 3, and it is attached to the pleadings—that is the one entitled “Cooperative or Unit Plan of Development, Unit 5,” the Court will recall that originally in our complaint we sought to have that declared to be void for failure of consideration, but that portion of the complaint was deleted; but it is our position that by the [8] express language of the Unit 5 agreement, it can have no possible application to these deeper sands. Again the Unit Plan, we will show, was prepared by the defendant Montana-Dakota Utilities Company, and the language in it is its language, and not ours. I call the Court’s attention to Paragraph 17, in which it is recited that nothing in the contract shall have the effect of creating a partnership or any interest in the lands committed, and each ones respective right, title and interest in the respective tracts shall remain unaffected by the Unit contract. Then, Paragraph 19, “That nothing herein contained shall be construed as affecting or passing title to any lands, leases, or permits, but the Operator shall acquire operating rights only. The Operator shall have the prior right to enter upon and occupy so much of the surface of the lands included herein as is necessary to carry on operations in Judith River Sands hereunder, but the owners and holders of lands, leases or permits subject hereto reserve unto themselves the right to occupy and use by themselves, their grantees, lessees, licensees”—and so forth—“for any and all purposes not inconsistent with the right herein given the Operator to operate the Judith River

Sands." Further, in Paragraph 22, there is a provision that any signatory to the contract can freely assign his interest without the consent of the Operator or anyone else, which we think makes it even clearer that this Unit Agreement, Unit 5, could not possibly be a blemish or [9] defect on our interest between 2,000 feet. I think the Court is aware of the fact the Fidelity Operating Agreement affects only the sands below 2,000 feet, and Unit 5 has application only to the Judith River Sands. When talking about the Operating Agreement in this action, we are primarily concerned with the sands below the 2,000 foot level.

We have pleaded, in addition to the fact that the contract was terminated by its own terms, that the defendants abandoned any interest that they might have under the Operating Agreement, and witnesses will be introduced and will testify to not only these direct and positive statements of the officers of Fidelity Gas and Montana-Dakota Utilities, but also testimony will be introduced to show conduct on the part of Fidelity Gas which indicated clearly their understanding that their failure to drill a further test well resulted in a termination of the contract, and that they had in fact abandoned any claim under this agreement.

We also will produce testimony that shows that the defendants are estopped now to claim any interest under this agreement; and we will point out to the Court by the testimony that the test well, which the defendants, we understand, will claim gives them a perpetual interest in our property, was

drilled in early 1937, and that a period something like 14 years has elapsed in which they gave no indication to any of the plaintiffs that they considered they had any interest in [10] our lands and leases; and now after the property has become potentially valuable because of oil discovery, they contend they can revive this long dead instrument, breathe life into it, giving them an interest in our lands, for which no consideration was paid, no delay rental or anything else.

In summary, that is the position the plaintiffs take in the manner.

Court: Do you want to make a statement at this time, Mr. Lamey?

Mr. Lamey: More just to the legal questions that have been suggested.

Court: Those have been covered in your brief. I have read your brief; I think I understand your position. I think we may proceed.

JOHN WIGHT

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Erickson): Will you state your name? A. John Wight.

Mr. Erickson: At this time, your Honor, we would like to put in the various exhibits on which there was agreement by the pretrial order, and I believe that is with the agreement of [11] counsel.

Court: They are in by the agreement, aren't they?

(Testimony of John Wight.)

Mr. Lamey: It said they may be offered without further identification. I think a further offer would be in order.

Mr. Erickson: At this time, we offer Exhibit 1 and 1-A, the map.

Mr. Lamey: No objection.

Court: They are admitted.

(Defendants' Exhibits 1 and 1-A admitted.)

Mr. Erickson: And Exhibit 2, which is the Operating Agreement.

Mr. Lamey: Which, Fidelity?

Mr. Erickson: Yes.

Mr. Lamey: No objection.

Court: Admitted.

(Defendants' Exhibit 2 admitted.)

Mr. Erickson: Exhibit 3, which is the Unit Plan.

Mr. Lamey: No objection.

Court: Admitted.

(Defendants' Exhibit 3 admitted.)

Mr. Erickson: As to Exhibit 4, we presented a proposed Exhibit 4 which is not typical of the gas purchase agreements, and the matter has been discussed with counsel. We would like now to withdraw Defendants' Proposed Exhibit 4, and substitute a later copy. It is the same agreement, except it is more [12] typical of those gas agreements.

Mr. Lamey: That is agreeable, your Honor.

Court: Very well.

(Defendants' Exhibit 4 admitted.)

Mr. Lamey: You can mark this as Exhibit 4 and withdraw the other and not encumber the record.

(Testimony of John Wight.)

Court: Yes.

Mr. Erickson: At this time, your Honor, as you will recall, we determined at the pretrial conference to introduce documentary evidence as to title by stipulation, and I will have Mr. Richards—oh, counsel calls my attention to the fact that the plaintiffs now desire and do move to dismiss the causes of action Number 3 and 4. They are Mondakota Gas actions, and that has been called to the attention of opposing counsel.

Court: Causes 3 and 4 of your amended complaint?

Mr. Erickson: Yes, and then the comparable provisions in the reply.

Court: Very well.

Mr. Lamey: Those have to do with the Mondakota causes of action, I believe.

Court: Yes.

Mr. Erickson: At this time I will ask Mr. Richards to put in the documentary evidence on the title.

Court: Yes.

Mr. Richards: We were working right up until the time [13] Court started getting the documents ready, so the stipulations aren't signed.

Court: Do you want to take a few minutes to read them? Do you need some time?

Mr. Johnson: There will be some instruments, your Honor, we haven't had an opportunity to proof.

Mr. Richards: That is a point I was going to

(Testimony of John Wight.)

raise. There are some typewritten copies going in here which neither side has had an opportunity to proof. My thought was they could be introduced with the understanding we might correct any typographical errors that might be found later on.

Court: That would be fine.

Mr. Richards: With reference to Causes of Action 1 and 2, in both Causes of Action 1 and 2, the same lands are described in each cause of action, so referring to Paragraph of the First Cause of Action, the documents relative to 025044-A are found as Exhibits 1, 3 and 4 of the stipulation; as to the facts of the First and Second Causes of Action, the documents as to 025044-B are found as Exhibits 2, 3 and 4. In other words, United States Oil and Gas Leases 025044-A and B are Exhibits 1 and 2 to the stipulation; the Operating Agreement between the permittee, Mr. Warren, and Cedar Creek Oil and Gas is Exhibit 3, and then the assignment from Mr. Warren to Mr. Dousman of an undivided one-half interest is Exhibit 4. We have got the exhibits attached to the stipulation [14] and marked Exhibits 1, 2, 3 and 4 on this stipulation.

Court: Let me see it just a minute?

Mr. Richards: Perhaps they could be stapled to the stipulations and not marked as exhibits at all.

Court: The stipulation refers directly to each one of the exhibits.

Mr. Richards: Yes, sir.

Court: I think you can just file the stipulations with the documents.

(Testimony of John Wight.)

Mr. Richards: And staple the document to the stipulation. With reference to the Fifth and Sixth Causes of Action, the Third and Fourth having been dismissed, I would refer the Court to page 10 of the amended complaint, the plaintiffs' claim to the lands is based upon two Federal leases, and an assignment of those leases to Plaintiff International Trust Company. Exhibit 1 to this stipulation as to the Fifth and Sixth Causes of Action is Federal Lease 029521-A; Exhibit 2 is Federal Lease 029521-B, and Exhibit 3 is the assignment from the lessee to plaintiff International Trust Company.

Court: Very well.

Mr. Richards: Now, on the Seventh and Eighth Causes of Action, we refer the Court to Page 14 of the amended complaint, Paragraphs 4 and 5. We have stipulated, arrived at a partial stipulation in regard to those lands, and in this stipulation there is a disclaimer of interest for the plaintiffs of this [15] action of the South Half of the Northeast Quarter of Section 12, Township 8 North, which you will find the fifth line down in the first paragraph. We disclaim the interest we allege in our Amended Complaint for the purposes of this action; then, the second paragraph, the interest claimed there is covered by Exhibits 1, 2, 3 and 4, attached to this stipulation, which are the Oil and Gas Leases issued to Mildred Vinsel, 026954-A and B, the Operating Agreement on those leases by Mrs. Vinsel to George Norbeck, and the assignment of the Operat-

(Testimony of John Wight.)

ing Agreement from George Norbeck to Susan Wight, and those are attached to this stipulation.

Court: Very well.

Mr. Richards: Now, referring back——

Court: Pardon me, just a minute. Harry, what do you think about these stipulations. Each one of them has Exhibits 1, 2 and 3. Do you think keeping them attached to the stipulation would be sufficient segregation?

Clerk of Court: I was going to attach them firmly.

Court: Very well.

Mr. Richards: Referring back to that first description of land in Paragraph 4 on page 14 of the Amended Complaint, we were not able to stipulate as to the interest of the plaintiff Susan Wight in the North Half of the North Half of Section 10, and the South Half of the Northeast Quarter—excuse me, Southeast Quarter of Section 12 and the East Half [16] of the Southeast Quarter of Section 12. That interest is covered by the following documents which I would like to introduce in evidence at this time: A certified copy of Billings Federal Lease 021056-B. That would be Plaintiffs' Exhibit——

Clerk of Court: You didn't offer Number 5, marked in Butte, Mr. Erickson. Did you intend to do that? You had it laying up here.

Mr. Erickson: May I, out of order, then, offer 5 because it is marked, which is the agreement between Shell and M.D.U.?

(Testimony of John Wight.)

Mr. Lamey: No objection.

Court: Very well, it is admitted.

Defendants' Exhibit 5 offered in evidence and received.)

Mr. Wagner: We have no objection.

Mr. Richards: The next document is a certified copy of the assignment from George Norbeck and Jane Norbeck to Susan M. Wight of the Southeast Quarter of Section 12, Township 8 North, Range 59 East.

Mr. Wagner: We have no objection, your Honor.

Court: Very well, admitted.

(Plaintiffs' Exhibit 7 admitted in evidence.)

Mr. Richards: The next is an assignment from the Norbecks to Susan M. Wight of the North Half of the North Half of Section 10, Township 8 North, Range 59 East. That would be Exhibit 8. [17]

Court: What is the exhibit number of this now?

Mr. Richards: This is number 8.

Mr. Wagner: No objection, your Honor.

Court: Very well, Exhibit 8 is admitted.

(Plaintiffs' Exhibit 8 admitted in evidence.)

Mr. Richards: The next document is an Oil and Gas Lease, and this refers, your Honor, to the land described in Paragraph 5 on Page 14, an Oil and Gas Lease between—excuse me, I will correct that—a lease between W. A. Beck and Susie Beck and Norbeck Company, dated June 3, 1931.

Court: That is marked Exhibit 9?

Mr. Richards: Exhibit 9.

Mr. Wagner: No objection, your Honor.

(Testimony of John Wight.)

Court: Very well, Exhibit 9 is admitted.

(Plaintiffs' Exhibit 9 admitted in evidence.)

Mr. Richards: And the final document at this time as an exhibit is a partial assignment of that Beck lease by the Norbeck Company to Susan M. Wight, dated December 31, 1935.

Court: Exhibit 10?

Mr. Richards: Exhibit 10.

Mr. Wagner: No objection.

Court: Very well, Exhibit 10 is admitted.

(Plaintiffs' Exhibit 10 admitted in evidence.)

Mr. Richards: And we pass on to the Ninth and Tenth Causes of Action and refer to page 18 of the Amended Complaint, [18] and it is understood that any of these documents, any typographical errors we might find later on, we can pick up and correct. Referring to the first description of land in Paragraph 4 on Page 18, the plaintiffs' title to that land is shown by Exhibits 1, 2, 3 of this stipulation, which are the original Federal Leases 029750-A and B, and the assignment of those leases by the original lessee to the plaintiff H. C. Smith in this cause of action. Then, the next two paragraphs are covered by a Consolidated Lease and by the same items in the stipulation. In other words, we have the original Consolidated Lease as Item 4 in the stipulation; the Assignment of that Consolidated Lease by the Lessee to Black Hills Oil and Gas is Item 5, and the Assignment by Black Hills Gas and Oil to plaintiff H. C. Smith is item 6 in the stipulation. Referring to the last paragraph there, the plaintiffs' title

(Testimony of John Wight.)

to the interest involved there is deraigned from original Federal Lease 021056-B issued to George Norbeck. A copy of the lease is Exhibit 7 attached to this stipulation; then on December 10, 1934, George Norbeck assigned a portion of that lease which covered the land claimed by plaintiff H. C. Smith here to Harry A. Smith. That assignment is Exhibit 8 attached to this stipulation, and on August 9, 1939, Harry A. Smith assigned a portion of the land he had received to H. C. Smith, which is the land that H. C. Smith is claiming under this part of the stipulation, and is Number 9 on the stipulation. [19]

Court: Very well, the stipulation and its attached exhibits may be filed.

Mr. Richards: Then, referring to page 24 of the Amended Complaint for the Eleventh and Twelfth Causes of Action, the first description of land is deraigned in very much the same fashion, very much the same as the last one I talked about in 9 and 10. The original Federal Lease was 021506-B. It is Exhibit 1. George Norbeck assigned part of the lease to Harry A. Smith, Exhibit 2, and Harry A. Smith assigned part of this lease to W. B. Haney, Exhibit 3. The next two paragraphs cover the 63/360 interest and are deraigned exactly the same through the Black Hills Oil and Gas Company, as pointed out in 9 and 10, and that takes up numbers 4, 5, 6 and 7 of the stipulation; and that is all of the stipulations.

(Testimony of John Wight.)

Court: Very well, the stipulation and its exhibits may be filed.

Direct Examination—(Continued)

Q. (By Mr. Erickson): Where do you reside, Wight?

A. At Billings, in the Weston Apartment, Billings, Montana.

Q. How long have you been a resident of Billings?

A. Well, off and on, most of the time, I might say, for possibly 30 or 35 years.

Q. In what business are you engaged, Mr. Wight?

A. Oil and gas and refining.

Q. You are not a party to this action, are you?

A. No.

Q. Do you have an interest in any of these properties here involved?

A. I do.

Q. In which ones?

A. Well, I have a direct interest in International Trust.

Q. How does that interest come about?

A. I was the one that had the trust created, and it could be revoked by me at any time, and I also have a direct interest in the trust, and indirectly I have an interest in the Susan M. Wight. I also have an interest, a small interest in the Cedar Creek Oil and Gas and H. C. Smith and Haney.

Q. So, you are an interested witness in this proceeding?

A. That's right.

Q. Have you been familiar with the develop-

(Testimony of John Wight.)

ment of what is denominated as the Cedar Creek anticline? A. I have.

Q. When did that interest originate, Mr. Wight?

A. I started leasing out land in about 1918 for the purpose of drilling for gas wells.

Q. Was that in the Cedar Creek area?

A. It was in the Cedar Creek area.

Q. Whereabouts did you acquire leases originally?

A. From practically one end, from the south there, clear up to the north and near the town of Glendive. [21]

Q. Had gas discoveries been made there prior to that time?

A. Yes, there had been some gas discoveries made prior to that time.

Q. Did your leasing activities continue?

A. They did continue until some time passed, up in the '30's; in fact, it continued even later than that.

Q. Now, can you give us an idea of about how—as you stated before, your leasing activities were around the area denominated as the Cedar Creek Anticline in Exhibit 1 and 1-A?

A. I had leased or acquired leases on approximately half of the structure. I think by 1925 or 1926, in the Cedar Creek field I had acquired leases on something like 85,000 acres.

Q. Did you hold those in your own name?

A. Some of them; and some of them in the name of a company we had by the name of Capital Gas

(Testimony of John Wight.)

Corporation; some were held in the name of another corporation of which myself and family had controlling interest named Montana Eastern Pipe Line Company. A lot of the leases were held in various individuals' names with which I had operating agreements and powers of attorney from them.

Q. Now, with relation to this activity in the Cedar Creek Anticline, did you yourself drill any gas wells there?

A. Yes, I drilled in the '20's, and perhaps some of those wells even after 1930; most of them in the '20's. I have forgotten now, I think it is 13 or 15 wells with a production [22] of somewhere between 150 and 200 million feet, cubic feet per day.

Q. Where were the wells with reference to Unit 5?

A. Most of them were in 5, and some of them were in Unit 4 and some in 6. The majority in Unit 4 and 5, mostly in 5.

Q. Did you have a market for your production?

A. No, I did not.

Q. What was the purpose of drilling these wells?

A. The idea, the original idea was to develop a sufficient amount of reserve that would justify the construction of a pipe line to some eastern markets.

Q. Were you active in trying to promote construction of a pipe line?

A. I was, very much so.

Q. Those wells you spoke of having drilled were drilled by you or by one of your companies?

(Testimony of John Wight.)

A. I think there was two drilled by me and the rest of them drilled by some of my companies.

Q. What was the total number of wells you drilled on that structure prior to 1930?

A. I am not sure whether it was—somewhere between 12 and 15; I am not just sure.

Q. Were most of those wells on Federal leases?

A. Yes, I believe they were all on Federal leases.

Q. Under those leases, you were required to pay rent whether [23] there was production or not?

A. That's right.

Q. Was anyone else drilling wells in the area at the same time, having reference to the time you were drilling these 12 or 15 wells?

A. There were quite a few wells drilled in the early part of 1920 by a large number of people. One of those was a fellow named—

Q. A little louder.

A. Quite a few wells drilled between 1915 and 1920, which I contributed part of the expense of drilling; some of those wells by a man by the name of John Johns. Most of the wells I definitely financed drilling were drilled between 1927 or 1928 and 1931 or 1932. About 1926, 1927 or 1928, Montana-Dakota Utilities or Minnesota Northern Power was drilling some wells in there.

Q. Montana-Dakota Utilities hadn't come into existence.

A. I think at that time they were designated as Minnesota Northern Power.

(Testimony of John Wight.)

Q. Was there some drilling by Cedar Creek Oil and Gas?

A. Yes, Cedar Creek Oil and Gas carried on some drilling, and a fellow named Rehnke and McDonald, and I helped finance part of the McDonald drilling.

Q. As a result of all of this drilling that occurred there during that period, was there a market developed for the gas? [24]

A. Yes, there was a market developed for some of the gas by Carbon Black Company. Later they closed down and moved out or was legislated out, I don't know which it was now. About that time, Northern Minnesota or Montana-Dakota Utilities built a pipe line; then there was a market available.

Q. Did you sell gas prior to the date of these unit agreements to Minnesota Northern?

A. No, I didn't.

Q. Was there production from their wells on the lands adjoining yours? A. Yes.

Q. As a result of that were you required to pay compensatory royalties? A. I was.

Q. What are those?

A. I don't know the amounts.

Q. Just explain to the Court?

A. Compensatory royalties is a royalty that the Government charged us, or charged me, I might say, for the gas that was being drained or depleted from Government leases which we held leases on, being depleted from wells on fee lands, or railroad lands,

(Testimony of John Wight.)

or lands in which the Government had no interest, so the Geological Survey would estimate the amount of drainage that was taking place from the producing wells on non-Government lands, and then they would assess a certain proportionate [25] amount of compensatory royalty based on the amount of gas they thought was being depleted from Government lands by adjacent wells on non-Government lands.

Q. What was the effect of that on your leases?

A. It made it very, very expensive and difficult to hold leases without a market.

Q. As a result of the situation that existed down there with the production and the necessity for paying lease rentals or compensatory royalties, what effort did you make to find a market for your gas?

A. I tried for many years to induce Minnesota Northern or Montana-Dakota Utilities to take our gas or transport it. They were legally a common carrier——

Mr. Lamey: We object to the statement of opinion, counsel, and ask it be stricken.

Court: It may be stricken; the objection is sustained.

Mr. Erickson: The purpose of this line of testimony—I will not pursue it much longer—is just to give you the background, and we are not leading to any other matter than the one here before us.

Court: That is fine.

Q. At any rate, you offered the gas for shipment to Minnesota Northern, and they didn't take it, is that correct?

(Testimony of John Wight.)

A. That's right, not until after the unit plans were agreed upon. [26]

Q. Now, as the result of your situation, did you enter into any negotiations with the predecessor companies of Montana-Dakota Utilities, looking to the sale of your gas? A. Yes.

Q. Tell the Court the circumstances under which those negotiations arose?

A. Do you refer now to the unit plans?

Q. Yes, to the unit plan.

A. Somewhere along about 1932, I believe it was, the Montana-Dakota Utilities, or Minnesota Northern Power, I think at that time it was—Montana-Dakota Utilities——

Q. Might it have been Gas Development?

A. Yes, Gas Development.

Q. Minnesota Northern, Gas Development, and M.D.U. are all the same? A. Yes.

Q. There were mergers effected and other things, is that correct?

A. Yes, correct. They submitted a unit plan of operation to unitize the Judith River sands reached at depths generally of 600 to 1,000 feet.

Q. Was there production from any other sand at that time?

A. There was some production, I believe, further south in the Eagle sand, which lies four to six hundred feet below the Judith River, but to my recollection, I don't believe there [27] was any in Unit 5 at that time.

Q. At the time you were discussing this Unit

(Testimony of John Wight.)

Plan with Montana-Dakota Utilities, or its predecessor companies, who were you representing?

A. I was representing, of course, myself; I was representing Capital Gas Corporation, Montana Eastern Pipe Line; I was representing 25 or 30 individuals with whom I had operating agreements or powers of attorney; also, I represented, to some extent, Cedar Creek Oil and Gas Company, and Mr. Jirik, and later on I represented W. B. Haney and H. C. Smith, but they weren't in the deal when negotiations really commenced.

Q. Where did the negotiations take place, Mr. Wight? A. Mostly in Billings, Montana.

Q. Who was there representing Montana-Dakota Utilities?

A. Alger Syme on one or two occasions; Raymond Hildebrand was there, I think, two different times, and Cecil Smith. I don't believe Mr. Heskett attended those meetings, although he may have attended one, and I think, as I recall now, on some occasions, one or two other officials of Montana-Dakota Utilities were present at some of those meetings.

Q. Was an instrument prepared that ultimately became a contract for unit operation?

A. There was.

Q. Will you explain the circumstances under which that instrument was drafted? [28]

A. Well, originally, the Gas Development Company or M.D.U. submitted me a copy. It was printed in counterparts, and they submitted me a

(Testimony of John Wight.)

copy and wanted to know if I could approve of it. I couldn't approve of it because there were so many terms and conditions in there I didn't like. I believe at that time they told me they had already received tentative approval from the United States Geological Survey. When I refused to approve of it, we got together at several meetings and we ironed out some of the difficulties. They did make some concessions, did make some modifications of the contract.

Q. When the contract was put in final form, who did that?

A. The Gas Development Company or Montana-Dakota Utilities.

Q. Now, you speak of certain concessions. I believe the original unit plan, which now appears as Defendants' Exhibit 3, limited the term for your participation in the unit agreement, is that correct?

A. I think three years or something; I believe five years on some, mostly three to five years.

Q. What was the purpose of the limitation of the term?

A. Because at that time I was trying to compel Montana-Dakota Utilities to file common carrier tariffs so I could transport my gas and sell it to my customers direct. I realized if I could do that, I could make many, many times more than I could out of joining the unit plan. In fact, the unit plan, even as signed, I didn't believe was profitable or would [29] earn us anything, but I had no alternative, and I did sign.

(Testimony of John Wight.)

Q. But subsequently that three year and five year provision didn't become operative, did it?

A. No, it took me 15 years to win the right to transport gas.

Q. That was long after the making of this agreement?
A. That's right.

Q. Now, in connection with the unit plan, were there other contracts negotiated?

A. Yes, attached to the unit plan and considered a part of the unit plan was the gas purchase contract to purchase the gas from the unitized Judith River sands.

Q. You are aware that that is the instrument that has been introduced here as Defendants' Exhibit 4, are you not, Mr. Wight?

A. Yes, that is the gas purchase contract that goes with the—it is really a part of the unit plan. Then, at the same time, there was another contract submitted to me called the deep test contract. That was the contract with the Fidelity Gas Company for all zones lower than 2,000 feet.

Q. That has been introduced as Exhibit 2. You are familiar with that as Exhibit 2?

A. That's right.

Q. Was that contract negotiated simultaneously with the others? [30]

A. The deep test or Fidelity contract was submitted to me about the same time, and they wanted, or they asked me to approve of it or disapprove of it because they wanted the three instruments dove-

(Testimony of John Wight.)

tailed together, wanted them to be executed approximately at the same time.

Q. In executing the instrument, Exhibit 2, you executed it on behalf of a number of different people, did you not? A. Yes.

Q. For whom did you execute it?

A. For the Capital Gas Corporation and for the Montana Eastern, and I don't remember now if I executed it as attorney-in-fact for any of the individuals, or if I merely took the agreements and had them executed. I believe in most cases I took the agreements and had each individual execute them.

Q. You are familiar with the history of that area, as indicated by your testimony, and as to the property now owned or claimed by H. C. Smith and W. B. Haney, can you tell me who executed the operating agreement as the then owners?

A. I executed some of them; some of that land at that time was under an operating agreement to either Montana Eastern Pipe Line or to Capital Gas, or to various Government lessees from whom I held powers of attorney and operating agreements.

Q. Now, the defendants have alleges, and the pleading indicates that as to the people involved here as plaintiffs, either they themselves, or their predecessors in interest, executed [31] this Fidelity agreement, is that your recollection of the fact?

A. Yes. I don't know whether Mr. Haney or Mr. Smith later executed supplemental or some other agreement, but originally those were executed either by me for and on behalf of one of the companies, or

(Testimony of John Wight.)

I had the party sign whom I represented as attorney-in-fact.

Court: Pardon me, I think we will take a five minute recess.

(5-minute recess.)

Mr. Erickson: I have difficulty realizing, your Honor, when you say five minutes, you mean it.

Court: I said five; actually I gave you a couple extra minutes. I think I said five.

Mr. Erickson: The facilities down the hall are a little crowded.

Court: Well, we will make it 10 the next time.

Mr. Erickson: May we have the last question, please.

(Last question and answer read back by reporter.)

Q. Mr. Wight, you made a statement before the recess that you had looked after the interests of Cedar Creek, W. B. Haney, H. C. Smith and others. Did you mean by that statement that you were their agent or are their agent?

A. No, I have never been their agent; I merely had a verbal understanding with them that as long as I was on the ground [32] and knew more about the situation than they did, they would like to have me sort of watch everything for them and advise them as to what should be done, and just more or less to sort of look after their interest.

Q. But, you had no power of attorney or no agency, is that correct?

A. No, I haven't, or never have had any power

(Testimony of John Wight.)

of attorney or agency from Cedar Creek or Smith to represent them as agent.

Q. The people actually interested in the Cedar Creek Oil and Gas are Tom Jirik and George Seiv-
ers, is that correct? A. That's right.

Q. They are not residents of Montana, are they?
A. No.

Q. H. C. Smith and W. B. Haney reside in Cali-
fornia, is that correct? A. That's right.

Q Calling your attention to Exhibit 2, which
is the Operating Agreement, can you tell me under
what circumstances that agreement was executed?

A. Well, as I stated before, that was submitted
to me at the same time that the unit agreement
and gas purchase contract were submitted, and I
know that the officials and attorneys for M.D.U. or
Gas Development Company wanted them all exe-
cuted more or less together. I remember I was
successful [33] in getting quite a few changes made
in the unit agreement, but it seems to me the only
concession I was able to get in the deep test agree-
ment exhibit was that they agreed to drill a second
well in Unit 5. I think, however, that was a verbal
promise instead of any written agreement.

Q. Did you have any part in drafting that
agreement? A. No, I didn't.

Q. I note that the original agreement in each
case is printed. Do you know who had that done?

A. No, I don't.

Q. But when you saw the printed agreement, it
was presented to you by whom?

(Testimony of John Wight.)

A. I believe it was mailed to me by Alger Syme.

Q. Who is Alger Syme?

A. He was one of the attorneys for the Montana-Dakota Utilities or Gas Development Company.

Court: Pardon me, when he says that he was successful in having changes made in the unit agreement——

Witness: The original agreement as submitted.

Court: The original agreement as submitted was not a printed form, is that it?

Witness: Yes, it was printed, but they reprinted it before it was finally signed.

Court: Very well.

Q. (By Mr. Erickson): Also was the original operating agreement [34] presented to you in printed form? A. Yes.

Q. Did you ever see it in any other form?

A. No.

Q. You say you were unsuccessful in getting changes made in the operating agreement, is that right?

A. It is my recollection I wasn't successful in getting changes made in the deep test or operating agreement, but I know I was in connection with the unit agreement.

Q. Can you say, Mr. Wight, whether the operating agreement might have been prepared by Cedar Creek Oil and Gas?

A. Not to my knowledge; they had nothing to do with it.

(Testimony of John Wight.)

Q. And so far as—well, do you know whether it is a fact that that agreement was prepared by Fidelity Gas or its attorneys?

A. Yes, definitely; it was either mailed to me or handed to me by some of the officials or attorneys for the Fidelity Gas or M.D.U.

Q. Do you know whether Alger Syme is still living? A. I understand he is not living.

Q. Did you examine the operating agreement prior to the time you signed it? A. I did.

Q. And at the time you signed this operating agreement, exhibit 2, some time in—— [35]

A. That was 1934.

Q. You say sometime in 1934?

A. I think that is when I signed it.

Q. I note from Exhibit 2, and the date isn't particularly material, I notice it was signed by Cedar Creek Oil and Gas in February, 1935. Would you say you had signed it prior to the time they signed? A. I think I did.

Q. You had been in the oil and gas business for sometime, is that correct? A. That's right.

Q. In going through the agreement, Mr. Wight, there is no provision apparently made for the length of time the agreement is to run. Do you know anything about that?

A. I know that is one of the matters that was discussed. It is also my recollection they wouldn't change it, so finally I had to sign it the way it was.

Q. Was there any discussion of Paragraph 4?

(Testimony of John Wight.)

A. We discussed the entire contract. I know there was a lot of——

Mr. Lamey: May it please the Court, we would like to have counsel fix the time and place for the discussion and then see if I have any objection.

Q. Yes. At the time you were negotiating the agreement which is exhibit 2, can you say where the discussion took place? [36]

A. It is my recollection we had two discussions in Billings, and it seems to me that before I signed them I also had one or two discussions in their office in Minneapolis.

Q. Can you say who was present when the discussions were held, with reference to the Billings discussions first?

A. In Billings, I would say the attorney was here, Ray Hildebrand or Alger Syme would be their attorneys; I think Cecil Smith or Mr. Gamble was there at one or two of the meetings.

Q. What about the meetings in Minneapolis?

A. At the meetings in Minneapolis, I think that was mostly in Mr. Syme's office, although it is my recollection at that time I also discussed the matter with Cecil Smith and Mr. Gamble, but I am quite sure most of that was with Mr. Syme.

Q. Those discussions took place just prior to the time the contract was executed?

A. I don't know just how much prior, but I would say immediately prior, yes.

Q. Now, with reference to the discussion at Billings, which I take it you recall to have been

(Testimony of John Wight.)

the first discussion, was there any discussions of Paragraph 4 of the contract, and I hand you Defendants' Exhibit 2?

Mr. Lamey: I would like to have that answered yes or no so I may make objection to further questions.

Q. Answer the question yes or no. A. Yes.

Q. What was the discussion?

Mr. Lamey: We object to that as incompetent, irrelevant and immaterial; the agreement subsequent to that discussion was reduced to writing, signed by the parties, and it speaks for itself.

Mr. Erickson: That, of course, is one of the vital points in this matter. It is our view that since the contract was prepared by the defendants, and since the contract is ambiguous, we should be entitled to explain the circumstances under which the contract was made.

Court: Well, I suppose what was said generally—that contract, having been prepared by one party is subject to being construed strictly against that party. Does that contemplate a conversation such as this where there were negotiations and he had changes made and that sort of thing?

Mr. Erickson: In the case of the Fidelity agreement, he was unsuccessful in getting changes.

Court: Yes, but he was negotiating on it. Isn't that a different situation than where A comes in with a contract and says, "Sign it here," and I sign it? Then, further, I don't see how you can vary the terms and conditions.

(Testimony of John Wight.)

Mr. Erickson: I don't believe we are trying to vary the terms. It is part of our argument, and I believe we may state it since no jury is here, it is our view that by Paragraph 4 they were required to drill a new test well within from 12 to [38] 18 months and——

Court: Won't that be a conclusion the Court will have to draw from a construction of the whole contract? I'll sustain the objection. In your prior statement, and in your brief, too, I believe you do refer to the fact that this was an agreement prepared by the defendants, and that it must be construed strictly against them. When the time comes, I wish you would look into this aspect of it: that while it may have been actually typewritten or printed, whatever form it is in, while that may have been done by one party, when the contract is actually discussed and negotiated, whether the same rule applies. I don't know. It occurs to me maybe the rule might be different.

Mr. Erickson: So far as the Court's ruling is concerned, it doesn't embarrass us because the purpose of the examination was limited primarily to calling the Court's attention to the paragraph, and we are not hurt by the ruling.

Court: That is fine. If there is any serious question about it, I would prefer, of course, to just reserve ruling and let you go ahead and put it in. I don't see it.

Mr. Erickson: We will give it further thought

(Testimony of John Wight.)

during the recess. If we feel it is important, we will make an offer of proof.

Court: Very well.

Q. Now, subsequent to the execution of this Defendants' [39] Exhibit 2, do you know what, if anything, was done by Fidelity Gas in the way of drilling on the Cedar Creek Anticline?

A. Yes, they drilled a well down in the south end of the field in accordance with the agreement, and then after that well was completed as a small producer, they did drill another well up in Unit 5 where we are interested, and that likewise was drilled in accordance with the agreement.

Q. Just by way of further introduction here, prior to the time of the drilling by Fidelity Gas of the N.P. Number 1 well, which is, I believe, the one designated as the first well, isn't it, Mr. Wight?

A. I think so.

Q. And according to the map, which is Exhibit 1-A, and I would like to have counsel be sure I am correct on this, the Number 1 Northern Pacific well was drilled in Unit 8-B at a point designated as "MDU NP No. 1," is that correct, Mr. Johnson?

Mr. Johnson: That is correct.

Q. Now, while Mr. Johnson is here, calling your attention to the second well, I believe that well is known as the Warren Well, isn't that correct?

A. That is my understanding.

Q. That is on acreage now controlled by Cedar Creek Oil and Gas?

A. That is correct; that is Unit 5. [40]

(Testimony of John Wight.)

Q. I believe in Unit 5 there is a well marked "MDU Warren No. 1" in Section 23, in the southwest quarter. You would say that is the location of that well? A. That's right.

Q. While the Warren well was being drilled, I believe the Smith well was also being drilled, which is also down in Unit 8-B—Mr. Smith, can you tell us where the Smith No. 1 was? May I call him to the map?

Court: Yes.

Q. By the map, Mr. Wight, it is indicated that the Smith well is marked "MDU" and is in Section 8 in Unit 8-B close to the N.P. Well, is that your recollection?

A. It is my recollection; I didn't know the exact location, but I know approximately.

Q. Did you know when the Warren well was drilled?

A. No, it was my recollection it was abandoned sometime in the early part of 1937.

Q. Do you know what the results of the drilling were on the Warren well?

A. They did not encounter commercial production.

Q. Were you yourself down there while the drilling took place? A. Just once.

Q. How far along was the drilling at that time?

A. It was just shortly before they were getting ready to [41] abandon it.

Mr. Erickson: May we have a few minutes?

Court: Do you want to take a short recess?

(Testimony of John Wight.)

Mr. Erickson: Maybe. This is an important stipulation and it might save us some time.

Court: Very well, Court will stand in recess until 20 minutes of 12.

(10-minute recess.)

Mr. Erickson: In view of the questions asked by the Court on this matter of negotiations, or the indicated view, I want to be sure the record is clear as to what happened on the Fidelity negotiations. I would like to ask one or two questions along that line.

Court: Very well.

Q. When you signed the Fidelity agreement, you said there had been a considerable amount of discussion with representatives of Montana-Dakota Utilities Company, is that correct?

A. That's right.

Q. As a result of those discussions, were any changes made in the original printed operating agreement offered to you?

A. None that I recall.

Court: We were discussing the unit agreement at the time the question arose.

Mr. Erickson: No, it was the operating agreement we were discussing at that time. As to the unit agreement, I believe [42] his testimony was there were some changes made in the unit agreement, but none in the operating agreement.

A. As far as I can recall, none.

Q. As to the gas purchase agreements, what was the situation with respect to them?

(Testimony of John Wight.)

A. There may have been some changes made, but I am not sure of them.

Mr. Erickson: At this time the plaintiffs would like the record to show that we agree that the well N. P. No. 1, the Smith well, and the Warren well, which is the one on Unit 5 lands, were drilled within the time provided in the operating agreement, which required that the test wells referred to, or test well referred to in Paragraph 3 be drilled within one year after the completion of certain agreements with certain other owners in the lower areas, down in Unit 8-A and 8-B.

Court: Very well.

Mr. Lamey: I think that may be agreed. Counsel spoke about the N. P. No. 1 Smith well.

Mr. Erickson: They are two separate wells.

Court: Yes.

Mr. Erickson: N. P. No. 1, Smith, and Warren.

Court: Smith is near N. P., and Warren is up in 5.

Mr. Erickson: We want the record clear we are not here contending that they failed to carry out the drilling operations contained in Paragraph 3 and related paragraphs of the [43] agreement.

Court: Very well.

Mr. Lamey: It is so understood.

Q. Mr. Wight, do you know the depth to which the Warren well was drilled?

A. Only what I have been told, and I think that was around 72 or 73 hundred feet.

Q. Now, at the time the Warren well was being

(Testimony of John Wight.)

drilled, and theretofore during the years of 1936 and 1937, did you receive reports of the results of the deep test drilling from Montana-Dakota Utilities Company? A. Yes, I did.

Q. How frequently did you receive such reports?

A. During the course of drilling, I think I received about three reports, perhaps three or four.

Q. You heretofore testified on a proceeding for the taking of your deposition, did you not, Mr. Wight? A. That's right.

Q. Now, I will show you a letter which will be introduced through another witness, but I would like to have it marked tentatively for identification as Plaintiffs' Exhibit 11, and ask you if you recall receiving a letter similar to this letter, which is directed to Mr. Jirik?

A. I wouldn't want to say that it was similar, but I did receive reports giving the progress of the drilling. [44]

Q. You have searched your files in preparation for this trial, have you not? A. That's right.

Q. You were unable to find in your files a letter similar to the one I showed you?

A. That's right.

Q. Would it be your impression you did receive a report of that nature dated sometime in 1935?

A. My recollection would be that I did.

Q. I now hand you Plaintiffs' Proposed Exhibit 12, and ask you if you have seen that before?

A. Yes, I have.

Q. That came from you files, did it not?

(Testimony of John Wight.)

A. That's right.

Q. It is dated? A. November 1, 1937.

Q. And this letter bears the signature of Cecil W. Smith, is that correct? A. That's right.

Q. What is the general nature of the letter, Mr. Wight?

A. It is the production runs on the N. P. No. 1 well for December, 1936, January, February, March, 1937, and for July, August, September, 1937, and also the Smith No. 1 well for May, June, July, August, September, 1937.

Mr. Erickson: At this time we offer Plaintiffs' Exhibit [45] 12.

Mr. Lamey: No objection.

Court: Admitted.

(Plaintiffs' Exhibit 12 admitted in evidence.)

Q. Do you recall receiving during the years 1936 and 1937 other letters from Montana-Dakota Utilities concerning the progress of the deep test drilling in the Cedar Creek field?

A. I recall receiving some during the course of drilling. That was in 1936. I am not sure I received any in 1937 in regards to the Warren well.

Q. Do you recall receiving any other letter in 1937 except Exhibit 12, which has to do with production in N. P. No. 1 and Smith?

A. No, I don't have any recollection of receiving any.

Q. Do you know when drilling ceased on Warren No. 1?

(Testimony of John Wight.)

A. In the inquiry I have recently made, I understand it was ceased in January, 1937.

Q. When did you first know, if you can recall, that the drilling had ceased in Warren No. 1?

A. I either read some article in one of the papers or was told that the well was going to be abandoned, possibly two or three weeks, or maybe it might have been a month before they actually abandoned it.

Q. On your deposition, you testified you thought you read an article in the Miles City Star or the Fallon County Times or [46] the Montana Oil and Gas Journal announcing the plan of the Montana-Dakota Utilities or Fidelity Gas to terminate drilling or abandon the Warren No. 1. Were you able to find such article?

A. No, I haven't; I have hunted, but haven't been able to find anything.

Q. What, if anything, did you do when you learned that Fidelity Gas was abandoning operations on the Warren well?

A. As soon as I was in a position to do so, I made a trip to Minneapolis to confer with officials of the Fidelity to see if I could induce them to go, to drill deeper.

Q. The head officials of both Montana-Dakota Utilities and Fidelity Gas, their office is in Minneapolis, is that true? A. That's right.

Q. And the officers of that company at that time, having reference now to 1937, were Mr. Heskett and Mr. Cecil Smith, is that your recollection?

A. Yes. My recollection is that the same offi-

(Testimony of John Wight.)

cials that controlled the Montana-Dakota Utilities also controlled the Fidelity.

Q. Do you know whether the offices of Fidelity Gas are in the same offices as Montana-Dakota Utilities? A. Yes.

Q. Do you know whether in 1937 Montana-Dakota Utilities existed as Montana-Dakota Utilities or Gas Development? [47]

A. I don't recall for sure.

Q. But, at any rate, Mr. Heskett and Mr. Smith were the principal officers of both corporations, is that true? A. That's right.

Q. Now, can you tell us when it was you made this trip to Minneapolis to confer with these two gentlemen?

A. In endeavoring to refresh my memory the best I could, I went down there in the early part of 1937 to Minneapolis, and I made another trip to Minneapolis a few months later.

Q. When you say "the early part of 1937," would you be able to tell us about what month that was?

A. No, I have no way of determining, except I know it was shortly after the well was abandoned.

Q. And your idea of when the well was abandoned was that it occurred sometime in January, 1937, is that correct?

A. That is the information that I have now, that it was abandoned sometime in January, 1937.

Q. When you went to Minneapolis, who did you there see connected with Fidelity Gas?

(Testimony of John Wight.)

A. To my recollection, the first man I talked to was Mr. Heskett.

Q. Where did you talk to Mr. Heskett?

A. At his office in their building in Minneapolis.

Q. Anyone else there present beside you and Mr. Heskett? A. Not that I recall. [48]

Q. Did your conversation have to do with the Warren well?

A. Yes, that is what I went down there definitely for was to discuss the possibility of them drilling the Warren well deeper.

Q. Tell us what that conversation was between you and Mr. Heskett?

A. I went down there to see them, if I could get them to go deeper because I thought there was a possibility of encountering oil at a greater depth. He told me definitely at that time they were through drilling for oil, had gotten their hands burned, so to speak, and the stockholders were complaining about spending so much money; they were definitely through drilling for oil, not going to do any more development as far as oil was concerned; they were going to stick to drilling for gas.

Q. Was that conversation with reference to the Cedar Creek Anticline?

A. With reference to the Cedar Creek Anticline.

Q. Did it have reference to the Exhibit 2, the operating agreement?

A. It applied to lands included in Exhibit 2.

Q. Any further discussion between you and Mr. Heskett at that first conversation?

(Testimony of John Wight.)

A. I spent about a week there on that trip. I had two or three visits with Mr. Heskett. It is my recollection I also [49] talked to Mr. Smith about the matter, but mostly with Heskett.

Q. You say you talked to Mr. Smith, or to Mr. Heskett about deepening the Warren well. Were any arrangements made?

A. No, he said as far as he was concerned, he was through with it. However, he told me if I wanted to do something with it, I could do something with it. I wanted to work out some kind of an arrangement.

Q. Go ahead.

A. He told me, as I stated a minute ago, definitely they were through drilling for oil, but I was free to do whatever I wanted to do; if I had some proposition whereby they could get the well drilled deeper, they would be willing to listen to it, but as far as they were concerned, they were definitely through with any more oil wells.

Q. You saw Mr. Cecil Smith?

A. He wasn't at the meeting with Mr. Heskett. It is my recollection I also discussed the matter with him. As long as I wasn't getting any place with Heskett, I thought I might accomplish something with him.

Q. It was your purpose to induce them to drill the Warren well deeper?

A. That's right.

Q. Did you do anything to try to get the well drilled deeper?

A. Yes, shortly I went to Washington, D. C.

(Testimony of John Wight.)

and New York to [50] confer with people I had previously had negotiations with that claimed to have money for drilling purposes; then I came back to Minneapolis and then to Denver.

Q. Were you successful in raising money to deepen the well?

A. No. I devoted a good deal of time for about a year hoping I could find some method or arrange to get the money to drill the well deeper.

Q. Did you apprise Mr. Heskett or Mr. Smith of your efforts to raise money?

A. I don't recall, except in my original discussion to see what I was going to do. I don't believe they told me whether the well was in shape to drill deeper. It is my recollection they said the well would be in shape to drill deeper. I am not sure of that.

Q. Did you have further discussions with Mr. Heskett and Mr. Smith about the Warren No. 1 or any other wells?

A. Yes, as I say, I discussed the matter with them different times, I would say, for close to a year, on two or three trips.

Q. You mentioned an early trip and then a later trip. Can you tell us when the second trip was on which you discussed it with them.

A. I was in Minneapolis—I went through Minneapolis in August, 1937.

Q. How do you know you went through at that time?

A. Because I remember I stopped in Minneap-

(Testimony of John Wight.)

olis and then went [51] on down to Washington, D. C. I found a check I had given the Powhatan Hotel on August 13, 1937, so I recall definitely that trip. I stopped over in Minneapolis for several days and talked to Mr. Heskett on that trip.

Court: I think we will recess until two o'clock.

(Noon recess.)

Q. I believe, Mr. Wight, the last questions were addressed to the second trip you made to Minneapolis in which you say you had a discussion with Mr. Heskett and Mr. Smith, and I think you said that that conversation took place sometime in August, 1937, or thereabouts, is that correct?

A. That is correct.

Q. Where were those conversations held?

A. In the office of Mr. Heskett in Minneapolis.

Q. Who was present at the time of the discussion with Mr. Heskett, having reference to the first of any discussions you may have had on that second trip to Minneapolis?

A. I don't recall there was anyone in Mr. Heskett's office at the time I had various meetings with him, except himself, just the two of us.

Q. Now, with reference to the conversation you held later in the summer then, in 1937, in Mr. Heskett's office, with you and Mr. Heskett present, was there any discussion of this deep test proposition, either the contract or drilling?

A. Yes, that was the purpose of my going there was to discuss [52] further the possibility of deeper drilling or continuous drilling.

(Testimony of John Wight.)

Q. What was said in that conversation?

A. Mr. Heskett firmly restated the same as before, that they were definitely through drilling for oil.

Q. Was the statement with reference to Unit 5?

A. That was drilling for oil anywhere in the Cedar Creek field, Unit 5 or any other part of the field.

Q. At that time, there was some oil production, I believe, down in the N. P. No. 1, or perhaps the Smith, or both of them. Was there any discussion about that at that time?

A. The discussions applied to only what he called test wells; those discussions only applied to any further exploratory work or what we call wild-cat drilling. It had no reference to drilling offset wells to the producers in the south end.

Q. With relation to the lands covered in this lawsuit, were they singled out for special consideration in that discussion between you and Mr. Heskett or not?

A. Our discussions centered mostly around the Warren well, drilling that well deeper, or drilling another well in that same unit.

Q. What did Mr. Heskett say, if anything, about whether they would or not do any more test drilling?

A. He said definitely they were through and wouldn't do any more test drilling for oil. [53]

Q. Have you given us all the conversation you

(Testimony of John Wight.)

had with Mr. Heskett with reference to deep drilling or testing at that time?

A. The only conversation I have a firm recollection of is the fact he was through and I was unsuccessful in inducing them to drill deeper. That stands out very definitely. The other was there was a possibility if I could find someone to put up money that would drill the well deeper.

Q. At the time of your second visit with Mr. Heskett, had you already contacted the people you thought might put up the money to deepen the well?

A. I had.

Q. Do you know whether the Warren well in August, 1937, still had casing in it so it could have been drilled deeper?

A. I didn't check on that because of not having any success in locating someone who would drill deeper. I thought if I was successful, I could determine whether or not the well could be drilled deeper and what sort of a deal we could make for them to take over the casing in the well.

Q. In your trip in August, 1937, or thereabouts, besides your discussion with Mr. Heskett in his office, did you have any further conversation with him with relation to this deep test?

A. All my conversations with Mr. Heskett and also with Mr. Smith and Mr. Syme and all the officials I had discussions [54] on the matter with from shortly after the well, or about the time I had word it was going to be plugged or abandoned, for

(Testimony of John Wight.)

the following nine months or a year, centered around my efforts to induce them to drill the Warren well deeper, or if I was successful, to work out a deal to carry it on deeper.

Q. On your second trip to Minneapolis, did you have any discussions with Mr. Cecil Smith about this?

A. It is my recollection—I know most of my conversations in that respect were with Mr. Heskett. As I stated awhile ago, I still recall having some conversations with Cecil Smith, but I don't recall the details now, excepting they were along the same line.

Q. To sum up the conversations, the conversations you have spoken of, were they all to the same effect, that they were through with deep drilling?

A. Cecil Smith told me definitely they were through with any further exploratory work for oil; Mr. Heskett told me that and Mr. Syme told me that.

Q. After your second visit to Minneapolis in 1937, you indicated there might have been other conversations in the eight or nine month period in 1937. Were there any further discussions between you and Mr. Heskett, Mr. Smith, or Mr. Syme, or any other official of Montana-Dakota Utilities Company or Fidelity Gas Company on the deep drilling, deep testing?

A. No, nothing I can say, except as I say, they told me [55] firmly and definitely they were through with drilling any further exploratory oil wells,

(Testimony of John Wight.)

and as far as I was concerned, I was free to do what I wanted to with the oil rights.

Q. At that time you had some acreage yourself, did you? A. I had some acreage myself.

Q. You were an officer of Capital Gas?

A. And Montana Eastern.

Q. And Montana Eastern?

A. Yes. I still had an interest in the Atlantic Pacific acreage.

Q. Had Susan Wight acquired any of her interests at that time?

A. I think so, I am not sure.

Q. In 1938, did you have any conversation with any of these officials concerning the deep test?

A. It is my recollection I was down there in 1938, and I did discuss it with them with the idea of hoping they might have changed their mind and might have decided to go ahead and drill another well. I didn't have a long conversation with them at that time. They told me they were definitely through and their decision not to do any more exploratory work in that field still stood.

Q. Do you know whether they drilled any more wells in the Cedar Creek Anticline, that is, Fidelity Gas, from the year 1937 on? [56]

A. I don't think they did, as far as any information I had, they hadn't drilled any more wells.

Q. Were you keeping in touch with the field?

A. In a general way, yes.

Q. You retained some interest there?

A. Sure, I was very naturally very much in-

(Testimony of John Wight.)

terested in wells drilling anywhere I had any interest.

Q. After the conversations to which you referred, did you yourself make any attempt to lease the properties that are involved here to anyone else for drilling below the 2,000 foot level?

A. Yes, I did.

Q. How extensive was that?

A. About every 12 or 14 or 15 months, I would send out a mimeograph letter to possibly 50 or 75 or 100 oil companies wherein I would state we had the oil rights covering quite a large amount of land in the Cedar Creek field and wanted to know if they were interested, and if they were, we would send them maps, reports and data. I didn't have any success in any inquiries I sent out.

Q. Did your listing include lands other than your own in the unit?

A. Yes, Cedar Creek's, the Haney and Smith lands——

Mr. Lamey: We object, may it please the Court, as not the best evidence. He is testifying, as I understand, to [57] some instrument, letter or document he sent out.

Court: Sustained.

Q. Do you have in your possession, Mr. Wight, any of the letters, the lists that you sent out to people whom you tried to interest in this?

A. Yes.

Q. Interest in drilling in these deeper sands?

A. Yes.

(Testimony of John Wight.)

Q. Do you have any of those with you?

A. I had six or eight copies of the last mimeographed letter I sent out to the various oil companies.

Q. Do you have any explanation of why you don't have copies of the letters you sent out yearly other than to which you have referred?

A. We were so short of filing space several years ago we had to clean out most of our old files and destroy those we thought were no good. Those we thought might be some good in the future, we stored them in the attic of my former residence.

Q. Have you made an effort to find copies of those letters at my request?

A. I have.

Q. Have you been successful?

A. No.

Q. You made reference to one letter, which has been marked [58] for identification as Plaintiffs' Proposed Exhibit 13—

Court: While I think of it, I observe that a number of attorneys don't have any space at the counsel table. Mr. Harrington, will you get in touch with the Postmaster or whoever is in charge of furniture around here and ask him to supply another table in here this evening so that tomorrow—

Mr. Erickson: May I make a comment off the record?

Court: Yes.

(Off the record discussion.)

Q. Handing you Plaintiffs' Proposed Exhibit 13, will you tell us what that is?

(Testimony of John Wight.)

A. This is the last mimeographed copy of letter I sent out to perhaps 75 or 100 different oil companies.

Q. It bears no date.

A. The only way I could identify this was that I refer here to the Government auction sale. The only way I could identify the approximate date of this is because I referred to a sale being made by the Government on some lands in November, 1952, so I know the letter was sent out shortly after that.

Q. Do you have any copy of one of those letters showing a date and to whom it was addressed in your files?

A. It seems to me we did receive a few inquiries——

Q. No, I mean copies of this letter showing to whom it might have been sent?

A. I am not sure; it seemed to me I had, but I am not sure [59] about it.

Q. I asked you to find the letters you might have sent out. You produced this. Was there anything else you could find?

A. I think I found one or two inquiries or answers to that letter, but I wasn't sure I could identify that those letters were in answer to this particular letter.

Q. You see, this is a mimeographed letter, and you sent out this form of letter?

A. That's right.

Q. And this letter, with the exception of the

(Testimony of John Wight.)

address, it was, you said, sent to from 75 to 100——

A. I sent out at least 75 and perhaps as many as 100.

Mr. Erickson: I would like to now offer Plaintiffs' Proposed Exhibit 13.

Mr. Lamey: You now offer that in evidence?

Mr. Erickson: Yes.

Mr. Lamey: We object to it as incompetent, irrelevant and immaterial; it proves no issue in this case; there is no showing it was sent to any of the defendants and that they would be bound by it.

Court: Sustained.

Mr. Erickson: The offer is made, may it please the Court, to show that Mr. Wight made offers to somebody else. It doesn't have any effect on the defendants, because it was not addressed to them.

Court: It is not competent in any event. If that letter was sent to anyone, you should have subpoenaed the people to whom it was sent; in other words, the copy is not admissible in evidence until you have explained the absence of the original.

Q. Mr. Wight, did you discuss orally with representatives of oil companies the leasing of the deep sands after 1938? A. Yes.

Q. On more than one occasion?

A. Many, many occasions.

Q. Included in those with whom you had conversations concerning the leasing of these deeper sands, was the Shell Oil Company included?

A. Absolutely, they were.

Q. When did you first discuss the leasing of the

(Testimony of John Wight.)

deeper sands with any agent or representative of the Shell Oil Company?

A. One of the agents or representatives of the Shell Oil Company came in to my office to see me in answer to this mimeographed copy of this letter I had sent to them.

Q. Who was that?

A. I am not absolutely sure. I think it was Mr. Gadbois. There were two different men representing the Land and Leasing Department of the Shell Oil Company was in to see me. One of them, I am sure, was Mr. Gadbois. I forget the other man's [61] name.

Q. About when was that?

A. I have no way of placing the exact date with the exception it was a short time after I sent this letter out, and I would say it was some time in the last part, or sometime in 1952, perhaps in the last half.

Q. Did you, at that time, offer to lease to the Shell Oil Company or turn over to them these rights to drill in the deeper sands?

A. I did; they were very much interested.

Q. There was a discussion with Mr. Gadbois?

A. There was a discussion.

Q. With anyone else?

A. With two men, Mr. Gadbois and another, I don't remember his name, but it was with one of the men representing the Land and Lease Department of Shell Oil Company.

Q. How long did those discussions take?

(Testimony of John Wight.)

A. One discussion, I guess, perhaps three or four hours, and two or three discussions, perhaps, lesser time.

Q. How long a period of time did those discussions take?

A. The first discussion was when they said they were interested and wanted to check into it; the last discussion, perhaps several months after that, when they came through and told me——

Q. Wait a minute, now. When did these discussions terminate? [62]

A. I think it was in late 1952, as I recall now; I am not absolutely sure of the date. They terminated when they found out Montana-Dakota Utilities owned those oil rights and we didn't.

Mr. Erickson: Would you read the last answer?

(Answer read back by Reporter.)

A. That is the statement they made.

Q. Did you know between 1938, or the last part of 1937, until the date on which this statement was made to you by Mr. Gadbois that Montana-Dakota Utilities or Fidelity Gas was claiming any interest in the deep sands?

A. Never knew a thing about it; had no idea they were claiming an interest in the oil rights.

Mr. Lamey: Please read the last question and answer?

(Question and answer read back by Reporter.)

Q. And you were continuously, from 1937 up until that date, interested in these properties, or

(Testimony of John Wight.)

some of them, covered by the deep test agreement, were you not?

A. As I said before, every 10 or 12 months, or somewheres about that time, I would send out mimeographed letters to various oil companies seeing if I could interest them.

Q. Mr. Wight, there was an objection sustained, and what I am asking about is this: Were you keeping in close touch with the lands in this Unit 5 during the period from 1938 on through 1952?

A. Yes, I was.

Q. You were actively engaged in looking after the interests of Susan Wight, were you not?

A. I had other interests, International Trust, as I say; most of the time, or for awhile, I had an interest in the Capital Gas, and some other holdings there until I finally lost those.

Q. During the period from 1938 through 1952, were you in correspondence with Montana-Dakota Utilities generally on the matter of gas production and so forth in the field?

A. Yes, I had some correspondence pertaining to the various phases of the unit plan or gas development.

Q. I now show you, Mr. Wight, Plaintiffs' Proposed Exhibit 14, which is a letter dated April 27, 1951, and addressed to Mondakota Gas Company. Who is Mondakota Gas Company?

A. That is a company I am now president of.

Q. You have been interested in Mondakota Gas Company over the years?

A. I have.

(Testimony of John Wight.)

Q. They have held leases and interests in the Unit 5 area, have they not?

A. Yes, they had some interest in Unit 5.

Q. That letter bears what appears to be the signature of Cecil M. Smith. Where did you receive that letter?

A. It was either handed to me or mailed [64] to me, perhaps—that letter was either handed or mailed to me, perhaps a year or a little longer than the date of it.

Q. And the date is April 27, 1951?

A. That's right.

Mr. Erickson: I now offer Plaintiffs' Exhibit 14.

Mr. Lamey: No objection.

Court: Admitted.

(Plaintiffs' Exhibit 14 admitted in evidence.)

A. I might say I don't think that is Cecil Smith's signature.

Q. Do you have any explanation why you didn't secure a copy of this letter until a period of time considerably after it was dated?

A. That was addressed to the former office of the auditor for Mondakota Gas Company in California, and most of those letters were in custody of some of the other officials of the company.

Q. Had you seen any other copy of this letter addressed to any other of the plaintiffs or anybody else prior to the time you saw this one?

A. I think I saw one addressed to Susan M. Wight about the same time, or it might have been before that.

(Testimony of John Wight.)

Q. You mean about the same time you saw this one, or the same time it is dated?

A. The same time I saw this one, approximately the same time. [65]

Q. Do you recall, Mr. Wight, whether your conversation with Mr. Gadbois in which he told you Montana-Dakota Utilities claimed to be owner of these deep sand rights occurred before or after you saw this letter? A. Before I saw the letter.

Q. So, you had the conversation with Mr. Gadbois as the first notice you had after 1938 that Montana-Dakota Utilities or Fidelity Gas was claiming rights in the deep sands, is that correct?

A. That is my recollection, that the first information I had that Fidelity Gas claimed the deep rights was when I got the information through Gadbois.

Q. Would you say whether or not the letter, Exhibit 14, is the first formalized statement you have seen by Montana-Dakota Utilities or Fidelity Gas to the effect they were claiming those interests after 1938?

A. Either this letter, Exhibit 14, or a similar one addressed to Susan M. Wight.

Q. But it would be the same letter?

A. The same type of letter.

Q. You testified this morning that during the period of time in which drilling was going forward, ending with the letter of November, 1937, which I believe is Exhibit 12, you had received yourself, or others whom you were, whose interests you were

(Testimony of John Wight.)

looking after, a number of reports from [66] Fidelity Gas on the operations for deep testing, is that correct?

A. I did receive a number of letters during the period they were actively drilling.

Q. Did you receive any report after the letter of November, which is Exhibit 12, November, 1937, from Fidelity Gas of any nature?

A. I can answer it this way, that after they abandoned the well, to my knowledge I never received any correspondence from the Fidelity Gas with reference to that well or any other drilling for oil or carrying on any operation pertaining to oil up until I saw these letters.

Q. Of April, 1951, is that correct?

A. That's right.

Q. During all of the period that has been covered, were you looking after Susan Wight's properties here? A. Yes.

Q. Were you taking care of the detail of correspondence?

A. I was taking care of all the details.

Q. There was production of gas from the Judith Sands on her properties during these years, was there not? A. Correct.

Q. Reports were made and checks were received from Montana-Dakota Utilities?

A. That's right.

Q. Were those all handled by you? [67]

A. I wouldn't say all of them; any that required any attention was handled by me.

(Testimony of John Wight.)

Q. Is it a fair statement that during all the years you have looked after her interests in all of these properties for her? A. Absolutely.

Q. After you talked to Mr. Gadbois or he talked to you, and after you saw these letters, what, if anything, did you do in relation to these deep test agreements?

A. I arranged to have a notice sent out, not a cancellation notice, because I didn't think that it required a cancellation notice, but I arranged to have a notice sent out by all of what I would call my group notifying Fidelity Gas Company and M.D.U. that we did not recognize or consider as valid any rights they might have under the 1934 operating agreement or deep test agreement.

Q. You were served with a subpoena duces tecum, were you not, Mr. Wight, to produce certain instruments here? A. I was.

Q. Included in those instruments was a request that you produce a form of notice of cancellation directed to Montana-Dakota Utilities Company. It has now been marked as Plaintiffs' Exhibit 15, and it is entitled "Notice of Cancellation". Is that the form of the notice that you sent out to what you call your group in this matter? A. Yes, that is. [68]

Q. And do you know whether or not such a notice on this form was sent to the Montana-Dakota Utilities Company on behalf of Susan Wight?

A. Yes.

Q. Now, this notice of cancellation has to do

(Testimony of John Wight.)

with the cooperative or unit plan of development agreement, isn't that correct?

A. Yes, that is correct.

Q. I will ask you further about this—we now offer Plaintiffs' Exhibit 15.

Mr. Lamey: I would like to ask or have counsel ask the witness when this was sent. There is no date on it.

Q. Mr. Wight, do you know when this notice of cancellation was sent by Susan Wight to the Montana-Dakota Utilities Company?

A. No, I have no exact information, but I believe it was somewhere between six months and a year after these were originally prepared.

Q. Do you know when they were originally prepared?

A. I had these originally mineographed in 1949. It might have been even more than a year afterwards.

Mr. Erickson: I now offer Plaintiffs' Exhibit 15.

Mr. Lamey: No objection.

Court: It is admitted.

(Plaintiffs' Exhibit 15 admitted.) [69]

Q. Mr. Wight, during the period from the date the Fidelity agreement, the deep test agreement was executed to this date has Fidelity Gas paid any of the rentals or royalties that are to be paid under either the fee lease or the Government lease on the Susan Wight lands?

A. To my knowledge, I would say definitely not.

Q. Do you know whether they have or not?

(Testimony of John Wight.)

A. No, I have no way of knowing. The only way I would have of knowing is the statements that we received from the M.D.U. showing the deductions from the unit or rental payments showing that the unit owners are charged up with these rental payments.

Q. Now, how does that operate?

A. For instance, in Unit 5, M.D.U. sends out a statement every month showing the amount of gas taken out of the entire unit and the amount allocated to each unit owner. It shows also a statement as to what the unit expenses have been, so some months, or most of the months, there will be a statement that unit owner Susan M. Wight, or whoever it may be, are indebted to the M.D.U. for a certain amount of money.

Mr. Lamey: We object to this as not responsive, and it is incompetent, irrelevant and immaterial. I don't know what counsel is trying to show, that M.D.U. has or has not paid royalties under the Government leases. Perhaps we can stipulate on that. [70]

Court: I was going to say—it seems to me he said he doesn't know in the first place, that is his answer. It seems to me you ought to be able to get together on that.

Mr. Erickson: I am sure we can't. I believe the witness has shown, of course, he does know. The Court is familiar with the habit of a witness saying he doesn't know, and then going ahead and showing he does know. I want the record to show, and per-

(Testimony of John Wight.)

haps counsel agrees, that Fidelity Gas has never paid any rentals on these lands with its own money; rentals are paid with deductions from the royalties. If they will agree or stipulate on it, it is all right.

Mr. Lamey: As to that, these lands are divided 75 to the M.D.U. and Fidelity—I don't see how this can be an issue in this case anyway. That pertains only, as far as I can see, to the gas unit and maybe the gas purchase agreement.

Mr. Erickson: In the pleadings, defendants have set up they have expended large sums of their money in keeping alive their leases under the Fidelity Agreement, and the purpose of this line of testimony is to show they have paid no lease money under the Fidelity Agreement at all, and that anything that is paid is paid out of production on Unit 5, which is chargeable against the share of the land owner, so the land owner pays. That is the purpose of the testimony.

Court: Is that the fact? Can you agree on that?

Mr. Johnson: The fact is that the minimum [71] rentals have been paid by the company and have been recouped out of gas production.

Mr. Erickson: But that is not Fidelity.

Mr. Johnson: No rentals have been paid by these plaintiffs because rentals are minimum royalties on this particular acreage.

Court: Well, apparently you can't get together, you can't agree as to what was done, or what is done. I don't think he knows; he said he doesn't.

(Testimony of John Wight.)

He is talking about something he understands or has heard about.

Mr. Erickson: No. May I try to qualify the witness a little further, your Honor?

Court: Very well.

Q. You negotiated the Unit 5 agreement, is that correct? A. That's right.

Q. Over the years you have been agent for Susan M. Wight? A. That's right.

Q. You have handled all the details of her operations——

Court: Let me get this straight. I understood him to say he was never agent of any of these people.

Mr. Erickson: Not as to Susan Wight; he was agent as to Susan Wight, but not as to W. B. Haney, H. C. Smith or Cedar Creek Oil and Gas.

Court: Very well.

Q. Is that a correct statement? [72]

A. That is correct.

Q. Now, in handling her affairs, you have received the reports from the Montana-Dakota Utilities Company on the operations of the Unit 5 gas operation, have you not?

A. I do, every month.

Q. You examine those? A. I do.

Court: Of course, it may be the distinction between you is a distinction without any difference. Counsel has kind of said, "We pay them, and then recoup them from the earnings." Now, does that mean something particular to you, or aren't the

(Testimony of John Wight.)

payments taken from the earnings of the landlord under the agreement.

Mr. Johnson: They are paid in any event by Montana-Dakota Utilities, and under the unit plan, as production is realized, that is then an expense under the unit plan of operation.

Court: So it is the landlord's money that is paid?

Mr. Johnson: Yes.

Court: Does that satisfy the situation?

Mr. Erickson: I want to be sure the record is clear. When Mr. Jirik or someone else is on, I will present to him those statements for consideration.

Court: Fine.

Mr. Erickson: Perhaps counsel will stipulate Fidelity Gas has never paid them as such on any of these properties here [73] involved, is that a correct statement?

Mr. Lamey: That may be correct because there hasn't been production under them. You brought out there were three agreements here made together as sort of a basket deal. You are now talking about one phase of it, the unit agreement, under which royalties or rentals are adjusted. From that sense, they are paid through the unit plan and not under the Fidelity Agreement.

Mr. Erickson: I think that will be a matter for argument. I want the record to show Fidelity Gas as such has never paid them.

Court: Just as a matter of the way the trans-

(Testimony of John Wight.)

action was handled, Fidelity has not made payments.

Mr. Erickson: We think it goes further than that. It may be a matter for argument. So, we understand now that Fidelity as Fidelity has never paid any rents or royalties or money due under these leases.

Mr. Lamey: I don't know what issue that illustrates. In our suit on the Fidelity operating agreement, there is no issue on that. Our allegation is that we paid under all those agreements when we set them up in our estoppel. I can't see the significance of it.

Mr. Erickson: We believe it is tremendously significant.

Court: If you do, counsel, fine, go ahead with it, but I would suggest you are not going to prove it by this witness. [74] You had better prove it some other way. He is not going to be able to prove the point for you.

Q. Mr. Wight, do you know of your own knowledge in handling Susan Wight's interests here whether any payments have been made by Fidelity Gas as rental or in any other manner on any of the leases held by Susan Wight which are here covered? A. None whatsoever.

Q. Do you know they haven't?

A. I know they haven't as far as the statements are concerned.

Court: You are right back where you started, Judge. I think what you have to do is subpoena

(Testimony of John Wight.)

Fidelity Gas and get their records, make a demand for admissions on them. You are not going to prove it by this witness; you just can't do it.

Mr. Johnson: If the Court please, I would like to say I don't think there is any issue on this.

Court: I am not going to rule there isn't. The Judge thinks there is. I'll let him put the facts in. He thinks they are important. They can go in.

Mr. Erickson: Our position is that under the terms of the agreement, they agreed to keep up, keep these leases in good order and so on.

Court: Under the operating agreement?

Mr. Erickson: Under the operating agreement, that's right. [75]

Court: Then, you see, you have different theories. You see, you just say, "Well, it is not just the operating agreement, it is the unit agreement too that has to be considered." We can get all the facts and can decide whether it is Judge Erickson's theory or your theory that is correct, but because you have different theories, it doesn't mean he can't put the evidence in, but if he wants to put the evidence in, he can't do it with this witness. He doesn't know what Fidelity did or didn't do.

Mr. Erickson: There is an easy way; I think the parties can stipulate.

Court: Or, it is a little late in the game, but you might even make a demand for an admission as to what the situation is.

Mr. Erickson: I think we can work it out.

Mr. Lamey: I think so.

(Testimony of John Wight.)

Q. Do you know whether Susan Wight ever received any payment from Fidelity Gas under the deep test agreement? A. None whatsoever.

Q. Do you know whether International Trust ever got any payments of money from Fidelity Gas under the deep test agreement?

A. No, they did not.

Q. There was talk about the wells N.P. No. 1 and Smith where there was some production. Did Susan Wight ever receive any [76] payments out of production down there?

A. No, not out of oil production.

Q. That is what we are limiting it to.

A. Yes.

Q. She didn't receive any payments out of oil down in Unit 8-B, did she? A. No.

Mr. Erickson: I believe that is about the end of Mr. Wight's testimony. If we could have a few minutes recess to pull our notes together, we might have a little time.

Court: Very well, Court will stand in recess until three o'clock.

(10-minute recess.)

Q. Mr. Wight, calling your attention again to the circumstances at the time the operating agreement or deep test agreement was negotiated with Fidelity Gas, was there any discussion at the time as to what would happen in the event there was no success in the testing? A. Sure.

Q. What was the discussion?

Mr. Lamey: Wait. We object, may it please the

(Testimony of John Wight.)

Court, it is incompetent, irrelevant and immaterial; there is no issue in this case, no pleading to reform this agreement, and that the witness is now attempting to vary the terms of the written instrument by conversations that took place during [77] negotiations, no proper foundation laid.

Mr. Erickson: May I—this is somewhat along the line of the question asked this morning, your Honor, and so that the record will be clear, I might ask Mr. Wight one further question on that point, and that is whether that conversation related to the terms of the contract itself?

A. Sure it did.

Mr. Lamey: Same objection.

Court: Well, yes, I don't see—the terms of the contract govern. It is not going to make any difference.

Mr. Erickson: I will, of course, present this more fully, but the general rules as to the interpretation of contracts are contained in Chapter 13, 701 through 727 of the Montana Codes, and in that section appears the various provisions under which the circumstances of the contract may be explained, and also having particular reference to 13.720, that words should be taken most strongly against the person that supplied the words. I would like to make an offer of proof if the objection is sustained.

Court: Well, I don't think that this would go to that point. All you have to do to have the Court adopt that principle is to prove that this contract was the contract of the defendants.

(Testimony of John Wight.)

Mr. Erickson: I though I had done that.

Court: That is what I say, I am not saying [78] you haven't and so then the Court would construe the words used in the contract itself strictly against the defendants, if that is the fact.

Mr. Erickson: There is an added point, that we believe the contract on its face has an ambiguity in it that requires some explanation from somebody.

Court: I don't believe it has, and certainly you haven't alleged that. Now, if you are interested in it—I don't see—it may be you could amend your complaint and so allege, but I don't see that what this witness has to say about what that contract means is of any benefit to me. The words are in the contract here, and I am going to have to do that.

Mr. Erickson: It probably goes a little broader than that, the interpretation of the contract by the parties themselves.

Court: Is evidence of what they understood the contract to be.

Mr. Erickson: Yes.

Court: That is true, but that has to be put in issue first.

Mr. Erickson: I believe it is in issue under the general allegation of the complaint that the contract is terminated, and this goes to what terminates the contract.

Court: I just couldn't go along with you on that, I don't believe. I'll sustain the objection at this point. If you will look into it further before we finish this, I will be glad to reconsider.

(Testimony of John Wight.)

Mr. Erickson: I would like to make an offer of proof.

Court: Very well.

Mr. Erickson: The plaintiffs offer to prove through the witness on the stand that at the time the contract was negotiated, and during the discussions at the conference at Billings referred to by this witness, the question of the effect of unsuccessful testing or drilling program was discussed, and reference was made by one of the representatives of the Fidelity Gas Company to Paragraph 4 of the deep test agreement, and it was stated by the representative, and generally agreed that in the event the testing program was not successful, and in the event the testing program was terminated, that there would then be remaining in Fidelity Gas no rights under the contract, and that Section 4 was referred to as the section which had that effect.

Mr. Lamey: We object to that on the grounds heretofore stated.

Court: Very well, I'll sustain the objection.

Mr. Erickson: That is all.

Court: It seems to me, as I say—I don't want to foreclose you on this, and I would suggest that you maybe be of some assistance to me in presenting something to me to let me open this again if [80] I am wrong, but it seems to me if you want to reform a contract, you have to make proper allegations to admit the evidence, or if the contract is ambiguous, you have to so allege, and if it is ambiguous and you so allege and you want to explain

(Testimony of John Wight.)

it, you can show how the parties themselves have interpreted it. Otherwise, even though the parties themselves misinterpret the contract, if the contract is on its face plain, the Court is, so to speak, "stuck" with the contract. That is how I would look at it. I would ask you to present something to me to change that position I have taken.

Mr. Erickson: Briefly it is our view we are not seeking to reform the contract or vary its terms. It is a contract like many others, no matter what kind of a suit, the Court has got to find out what it means. The only purpose of this line of testimony is to show what the contract means, not to vary the terms or make different terms or anything else. That is the theory under which we would offer it.

Court: If you are not going to vary it or make it any different, then it is what the Court would find anyway. It seems to me it is going to be something so plain we are right back where we started.

Mr. Lamey: It seems to me it is an offer to have this witness to assist the Court to say what the contract is.

The Court: Not that I don't need some assistance, the theory of the law to the contrary. Very well, proceed. [S1]

Mr. Erickson: That is all I have of this witness.

Cross Examination

Q. (By Mr. Lamey): You testified a while ago with reference to a form that you say you sent out

(Testimony of John Wight.)

to a number of persons or oil companies in which you referred to some Government bidding in November, 1952, is that correct? A. That's right.

Q. Now, as I understand, it was perhaps in response to that that a Mr. Gadbois of Shell Oil Company came to you sometime later in 1952?

A. I am not absolutely certain it was from that form letter or one I sent out previous to that. I did receive some inquiries about that. I was more or less under the impression Gadbois came to me in response to that one; it may have been a previous one.

Q. You did testify Mr. Gadbois came to your office the latter part of 1952? A. 1951 or 1952.

Q. Just a few minutes ago, did I understand it correct that you said sometime after this letter, which you say was sent out after November, 1952, that Mr. Gadbois came to see you from Shell?

A. It was one of the letters I sent out. I sent [82] out several letters. I am not sure of the dates on that. I do know I had sent out several letters or mimeographs——

Q. Just a minute——

Mr. Erickson: May I make an objection? Since it is cross examination, the witness is entitled to explain his answers.

Court: Yes, he is entitled to explain his answer, but he should answer first.

Mr. Lamey: I want the question answered first, and he can explain it later if I don't give him the opportunity.

(Testimony of John Wight.)

Q. You saw Mr. Gadbois late in 1952, and he told you they had made a deal, is that it, with Fidelity for this acreage?

A. Yes, he said he had made some tentative deal with the M.D.U. on the acreage which included the acreage we had submitted to him, and he was satisfied in his mind that Montana-Dakota Utilities or Fidelity Gas Company had some claim on those oil rights, and, therefore, he was not going to deal with me.

Q. That was the first time you found out Shell had made a deal with Fidelity, is that right?

A. To my recollection—I can be wrong on those things, my memory could be hazy on some parts I didn't think was important, but I don't recall at this time of having any knowledge of the Montana-Dakota Utilities or Fidelity Gas Company claiming those oil rights until Mr. Gadbois told me that you [83] had laid some claim to them.

Q. And, to the best of your recollection, this was in 1952, late?

A. Well, I am not sure about the dates on that; as I say, I can't tell you whether it was 1951 or when it was. It was shortly after they had made the deal with M.D.U. for the lands. As far as the dates, I can't be positive on that.

Q. Would you say it was shortly after they made the deal?

A. It was shortly after they made the deal.

Q. Do I understand, then, that Mr. Gadbois

(Testimony of John Wight.)

saw you shortly after the deal was made between Shell and Fidelity?

A. No. So there won't be any misunderstanding, I said Mr. Gadbois first came in my office, apparently, before he had interviewed M.D.U., in answer to one of the circular letters we had sent out submitting these lands, either him or one of the other lease men of the Shell. They were in my office twice. Then, some several months afterwards, they came back, either Mr. Gadbois or the other man—I forget his name now—came back then and stated they had made some deal with M.D.U. for the lands, and he wasn't going to deal with me because he wasn't satisfied we owned the oil rights.

Q. When was that?

A. I don't know for sure.

Q. What year?

A. I can't tell you whether it was 1951 or 1952; [84] no use asking me, because I can't tell you.

Q. It is very important to us, Mr. Wight—

A. I know it is important; I can't pin it down. I have no way of doing it. I made no notes of it, so I can't pin it down.

Q. What is your best recollection of when you first saw Mr. Gadbois and he told you they had made a deal with Fidelity for these lands?

A. I think it was in 1952, but I can't be sure of that. It seems to me it was 1951 when he first was in my office. I have no way of knowing that.

Q. When did you first see the letter of April 27, 1951, which is referred to here as Exhibit 14,

(Testimony of John Wight.)

and in which I think we were reporting to Susan Wight?

A. It seems to me it was somewhere nine months to a year later. I can't be sure of it; I know it was a long time afterwards. It may have been over a year.

Q. By the way, who is Susan Wight?

A. She is my former wife, ex-wife.

Q. Former wife and wife?

A. No, I said, ex-wife.

Q. How long ago was it you were divorced, if that is what occurred?

A. About five years ago.

Q. You have continued since that time to act as her agent? A. Yes. [85]

Q. Where has she lived during the period since the divorce?

A. She is temporarily living in California; she still has her home in Billings.

Q. Up until recently she was living in Billings?

A. Yes.

Q. And you had your office in the Hedden Building in Billings? A. That's right.

Q. I believe you produced here a copy of that letter directed to the Mondakota Gas Company, of which you are the president?

A. I am the president now, yes.

Q. And how long was it after the date of that letter, April 27, 1951, that you first saw it?

A. Well, at that time, there was a fellow named Ladell, I believe, was president of Mondakota at

(Testimony of John Wight.)

that time, as I recall it now. I think it must have been a year after the letter was written before I saw it first.

Q. Where did you first see it?

A. I am not sure about that, but I think it was handed to me down in California, but I am not positive about it. We have an office in California, and the books and records of Mondakota are kept in California; although it may have been handed to me here. I don't remember now.

Mr. Lamey: May it please the Court, I would like to make reference to Mr. Wight's deposition on file, if it may be opened. [86]

Court: Yes, it may be opened.

Q. Mr. Wight, I will ask you to refer to page 34 of your deposition, which was taken in Billings on June 11, 1953, and ask you whether or not at that time you testified as follows, beginning with the fourth line, the fifth line from the top: "Question, You had prompt notice of the making of the contract between Shell Oil Company and Montana-Dakota Utilities? Answer, No, I had no knowledge of it whatever. Question, A letter was addressed to Susan Wight on April 27, 1951, a similar letter was sent to Mondakota, a similar letter to International Trust Company, and a similar letter to H. C. Smith and Haney? Answer, The first knowledge I received that the Montana-Dakota Utilities had made a deal with Shell Oil was by this lease man, Gadbois, told me. Later I saw those letters. Question, How soon after the deal was made was

(Testimony of John Wight.)

your information given to you by the Shell man?

Answer, It must have been very shortly after because he told me they made a deal with M.D.U. and couldn't make a deal with me. Question, In other words, very soon? Answer—" to the first sentence—"I assume very soon after that." Did you so testify at that time? A. I did.

Q. Now, you recall, do you not, that in the letter of April 25, 1955, reference was made to the [87] fact that a contract had been entered into with Shell Oil Company?

Court: 1951.

Q. 1951, I am sorry.

A. Yes, that's right.

Q. Does that help to refresh your memory that perhaps Mr. Gadbois was in your office sometime early in 1951?

A. No, my testimony in the deposition, and my statements now are the same because I said then I wasn't sure, and right now I am not sure of the date, but I did say then and I say now, I testified that the first I have recollection that M.D.U. made a deal with Shell is when Mr. Gadbois or one of the lease men from Shell told me. That was my first knowledge I had of the deal between M.D.U. and Shell.

Q. That would be when?

Mr. Erickson: To which we object on the grounds the question has been asked and answered.

Court: Overruled.

A. The first time I think Mr. Gadbois was in

(Testimony of John Wight.)

the office, I seem to place it somewhere in 1951. It seems to me it was in 1952 he told me he made the deal with Shell. I can't tell any more than that. It is my faint recollection. When it comes to dates, I didn't keep any record of dates. I am not good at remembering dates, so all I can do is give you my best recollection.

Q. Might he have talked about the agreement [88] with Fidelity when he was first in the office in 1951?

A. No, I have no recollection of it. I do have a recollection that I was in hopes of making a deal with them; I know all the time I was in hopes of making a deal with him. He came back the third time to tell me the deal was off.

Q. He came back the third time?

A. It seems to me it was 1952, but I may be wrong on that.

Q. About what time in 1952?

A. I can't tell you now at all; as I say, I have no way of knowing.

Q. You were well acquainted and kept in touch with conditions in the Cedar Creek Anticline in 1951 and 1952, were you not?

A. Yes, as far as any development. I can't tell what date a well was drilled or spudded in or this or that. All I know in a general way is what they were doing.

Q. Did you not know late in 1951 that Shell was drilling a well in the Pine Unit on the Northern end of the Cedar Creek Anticline?

(Testimony of John Wight.)

your signature? A. That's right. [91]

Q. That letter is directed to International Trust Company of Denver, which I understand is one of the plaintiffs in this case? A. That's right.

Q. Now, I call your attention to the last two sentences of the first paragraph, and particularly the last sentence, wherein it is stated, "However, we understand that they still claim some rights under and by virtue of the operating agreement." You so stated in that letter on July 12, 1951, did you not? A. That's right.

Q. That would be, of course, before you saw Mr. Gadbois, and he told you they were claiming interests, would it not?

A. No—it may have been—I don't think so. The first knowledge I recall having, the first time I would have any way of knowing that Fidelity had any rights was when Gadbois told me, because Fidelity never wrote and told me they had any rights, to the best of my recollection. Unless I could refresh my recollection some way, the first I had any definite knowledge or knowledge of any kind that Fidelity was claiming oil rights in the lands we were interested in in Unit 5 is when Mr. Gadbois or the other official of Shell told me you were.

Q. You have refreshed your recollection with this letter of July 12, 1951. Would you now say Mr. Gadbois told you about this prior to that date?

A. I would say definitely, yes.

Q. This letter, of course, does refer to a lease

(Testimony of John Wight.)

at Billings, 029521, which is one of the leases involved in this action, is that right?

A. That's right.

Q. So, then sometime prior to July 12, 1951, you found out and learned that Fidelity was still claiming under the operating agreement, at least as to the land in which International Trust Company was interested in, is that right?

A. That would be right.

Q. Now, you spoke of having talked with some other Shell man besides Gadbois?

Court: Pardon me, has this been offered in evidence?

Mr. Erickson: I have no objection.

Mr. Lamey: Pardon.

Mr. Erickson: I have no objection.

Mr. Lamey: We will offer it, then, your Honor.

The Court: Very well, it may be admitted.

(Defendants' Exhibit 16 admitted in evidence.)

Q. You indicated here you may have had some other discussions with Shell land men or representatives, is that correct?

A. I remember definitely that Mr. Gadbois was in the office, and I know there was another Shell man in the office talking about the leases, and I think there were three different men representing Shell in my office. [93]

Q. Who were the others besides Gadbois?

A. I am sorry, I couldn't tell you the names of them.

(Testimony of John Wight.)

Q. Well, when did the first one come?

A. I can't place the dates, but it was, it seemed to me like it would be somewhere between six months and a year prior to the time that I learned that Shell had made some deal with Fidelity for the oil rights involving the lands we claim.

Q. Six months prior to that, six or eight months?

A. I would say somewhere between six months and a year. I am just giving that as an estimate, refreshing my memory as best I can, it would be sometime between six months and a year, perhaps longer than that, before I learned they made a deal with Shell.

Q. It is rather definite in your mind that you saw Gadbois and he told you about the deal with Fidelity sometime prior to July, 1951?

A. All I can say, Gadbois is the first information I had, as far as I can remember, that the Shell had made a deal involving Fidelity and the lands we claim the oil rights under. I don't know what date that would be.

Q. There were some other representatives of Shell in to see you prior to the time Gadbois was there?

A. I am not sure; either shortly prior or shortly afterwards; I am not sure about that.

Q. Did two of them come together or did they come singly, or how? [94]

A. I think they were in there singly, I couldn't tell you for sure. We perhaps have 100 people a

(Testimony of John Wight.)

month come in our office to inquire about leases. I don't keep a record of them. They were just one or two or three men, people coming in to inquire about leases.

Q. Were all these conversations about these lands in Unit 5?

A. Conversations about lands mostly in Unit 5; there might have been some acreage in Unit 4, but mostly in Unit 5.

Q. Were they about lands involved in this suit?

A. Part of the lands involved in this suit. Practically all the lands we claimed any rights to in Unit 5 was discussed.

Q. You had other lands around Fallon County, did you not, or your company?

A. We perhaps might have had one or two small leases, I am not sure what I had on the main structure. I might have had one or two.

Q. Did Mr. Gadbois come alone, or somebody with him?

A. I am pretty sure he was alone.

Q. How many times did he come?

A. It is my recollection either three times or twice. However, the third time it is my recollection it might have been one of the other lease men.

Q. They were always dealing on the acreage involved in this suit? [95]

A. They came in the first time in answer to an inquiry in a circular letter I had sent out where we submitted these oil rights, told them we owned the oil rights. They came back and discussed the

(Testimony of John Wight.)

terms and the deal and so forth. The next time they came back was quite a little while after that. They said they were sorry they couldn't deal with us because they said they were satisfied Fidelity Gas Company controlled those oil rights, so there was no deal as far as we were concerned. I asked Mister, whichever one——

Q. Wait, I think you have answered the question. How long have you been president of Montdakota Gas Company?

A. The last time, possibly around two or two and a half years the last time—no, I was vice-president before that for awhile. I have been either vice-president or president most of the time for about 10 or 12 years.

Q. Well, Montdakota now has no further interest in any of the land in this suit, having dismissed its complaint as of today, is that right?

Mr. Erickson: To which we will object on the ground it is immaterial and irrelevant.

Court: Sustained.

Q. You testified this morning that you had an interest in the trust held by the plaintiff International Trust Company of Denver?

A. That's right. [96]

Q. Now, who are the beneficiaries under that trust?

A. My wife is beneficiary; I am—I am not sure whether I would be one of the beneficiaries or not, but there is no one else other than my wife, and perhaps myself.

(Testimony of John Wight.)

Q. By your wife, you mean your present wife?

A. My present wife.

Q. Was her name formerly Gerry?

A. That's right.

Q. Well, at one time, a Mrs. Wellington, or a Mrs. Middleton owned half of the beneficiary interest, did she not?

A. That's right.

Q. What became of that interest?

A. She had been paid the amount she invested, so she has no further interest.

Q. Did you take over that interest then?

A. Yes, I took over that interest. I was under the impression that I had modified the trust agreement giving that all to my present wife, but I am not sure. I think I did though.

Q. You think now your present wife is the primary beneficiary under the trust?

A. That is my recollection. I know that there was some discussion of amending that one time when I was in Denver. I think it was amended, but I am not sure.

Q. Is it a revocable trust? A. Yes. [97]

Q. And in the event of revocation, to whom does it go? A. To me.

Q. Who has the power of revocation?

A. I do.

Q. You also stated, I think, that you had some interest in the Susan Wight land or interest?

A. No actual interest. I have an interest to this extent: that it is up to me to try to do everything I can to protect her interests.

(Testimony of John Wight.)

Q. Is that in writing?

A. No, I don't think it is.

Q. Well, do you know?

A. No, in our settlement, I don't know whether that was in our settlement or not, I don't think it was. I believe that is just a verbal understanding that I have.

Q. You say you are obligated in some way to do everything you can to protect her interests, is that correct? A. I feel obligated, yes.

Mr. Erickson: To which I now object on the grounds it is incompetent, irrelevant and immaterial; in addition, of course, if there is an attempt here to impeach the title of Susan Wight, the title of Fidelity Gas and all the rest is deraigned from Susan Wight.

Court: No, I don't think that is being attempted. You brought forth that he was representing Susan [98] Wight, I suppose to try to show his lack of knowledge was the lack of knowledge also of Susan Wight, too.

Mr. Lamey: Your Honor, he went further and testified he had an indirect interest in Susan Wight and Smith and Haney.

Mr. Erickson: We have no objection to the matter. We think it encumbers the record. Our purpose in asking the question was to establish he was an interested witness so the matter of the weight of his testimony could be judged. I didn't want to put him forth as a disinterested witness. That was the purpose of it.

(Testimony of John Wight.)

Court: You then don't want the Court to understand at all that he was representing her or that she had no knowledge or anything of that nature?

Mr. Erickson: Probably insofar as Susan Wight, that would be true.

Court: Well, I think you had better go ahead and cross examine him.

Q. You testified this morning in the Susan Wight interest you had an indirect concern or interest. Now, what is that?

A. The only interest I have, as I said before, is in protecting her financial interest. I promised her I would do everything I could to protect all of the interest that had been assigned or had been conveyed to her in these properties. She knew nothing about it. I had been looking after those things of her for years. I promised I would do [99] everything I could, and I know this: I have this indirect financial interest: If she was to lose out on these interests, then I know it would be incumbent upon me to provide for her financial support, and that, on the other hand, if some of these properties I could look after would help provide certain financial care, it would relieve certain obligations on me later on. That constitutes my interest.

Q. Are you speaking now about some legal obligations such as a property settlement or decree of Court, or merely referring to a moral obligation you feel?

(Testimony of John Wight.)

A. I would say this way: It is a verbal understanding and promise we have.

Q. If she comes out well in these properties, you won't have to contribute anything to her support; on the other hand, if she comes out poorly, you would feel obligated to contribute?

A. That is my position, that is the position I take. I feel morally obligated to see that her interests are fully protected and that she realizes anything she can realize. If that is not a sufficient amount to take care of her needs, it is up to me to see they are taken care of.

Q. Other than that, would it make any difference to you one way or the other whether she succeeds or fails in this lawsuit?

A. Other than if she succeeded, I wouldn't get any money, but if she didn't succeed, it might eventually cost me money. [100]

Q. What is your indirect interest in the Cedar Creek end of this lawsuit?

Mr. Erickson: To which we make the objection it is incompetent, irrelevant and immaterial.

Court: Overruled.

A. I have a contingent interest in the Cedar Creek profits to this extent: That for financing the litigation and the cost of determining what their rights are, I will receive a certain percentage of whatever is gained or won, or is recovered or protected.

Q. Is that in writing?

A. That is in writing.

(Testimony of John Wight.)

Q. Do you have the document? A. I do.

Q. Mr. Wight, I now show you Defendants' Proposed Exhibit 17, and ask you if that is the written agreement that you have with the plaintiff Cedar Creek Oil and Gas Company with reference to your sharing in the outcome of this suit?

A. It is.

Mr. Erickson: To which we will object on the grounds, first, it is incompetent, irrelevant and immaterial, and in the second place, the question is framed without regard to the language of the agreement; it is not a proper statement as to what is contained in the agreement, but first because it is incompetent, irrelevant and immaterial. [101]

Court: It may be that the question was framed in words that might give the agreement some connotation other than what the agreement is.

Mr. Lamey: I will ask it another way. Mr. Wight, you have now examined Defendants' Proposed Exhibit 17. I will ask you if that is the only agreement you have with the plaintiff Cedar Creek?

A. It is.

Q. That indicates the only interest you may have in their side of the lawsuit?

A. That's right, that is the only agreement I have with them.

Q. Does this agreement, Exhibit 17, pertain to the lawsuit now on trial in this court?

A. Yes, it does.

Mr. Lamey: We now offer it.

Mr. Erickson: To which we object on the

(Testimony of John Wight.)

grounds and for the reason the exhibit is incompetent, irrelevant and immaterial, it doesn't serve to illustrate any issue in this case; further the date of the agreement is the 8th day of April, 1953, after the time of the commencement of this lawsuit, and for the further reason that it does not purport to affect the title to any of these lands or to give to Mr. Wight any interest in the lands in the event the litigation is successful. [102]

Court: Well, what is it, I thought that is what he said it was.

Mr. Lamey: May it please the Court, I believe counsel has indicated there are perhaps two or three other agreements. I am going to try to develop those now. Perhaps I will withdraw the offer until we get them all, and we will have a better chance to examine——

Mr. Erickson: To which we object. We believe the primary purpose is to prejudice the Court in this matter. I would like to have the exhibit offered, and I would object to the tender of any more agreements until there has been a ruling on the admissibility of them.

Court: I don't think that you can, or the Court either should determine the procedure that one party or the other wants to follow in presenting their case or presenting evidence. I may say I suppose your point is right, I don't know, I suppose that is one of the very points of this, not as you say, to prejudice the Court, but at least to inform the Court as to the witness' interest in the matter,

(Testimony of John Wight.)

and I don't know of any reason why that isn't permissible. The Court has to determine the credibility of witnesses. If these documents go to that, the Court must take them under consideration, but we don't have to rule on it now. Counsel has withdrawn his offer, but it would seem to me he is entitled to do that. I don't know why he shouldn't be.

Mr. Lamey: I am not trying to take advantage of counsel. I am going to try to expedite this. I have never seen these before. I want to get them all together.

Mr. Erickson: My position is if the Court accepts them, it is agreeable to us. I do believe as a matter of procedure since we do have an objection that counsel should offer it.

Court: I do think I agree. I think it would be better not to encumber the record by these matters if they don't go to the point you are thinking of, so it might be better for you, at some recess, to examine these documents before you even have them marked and presented.

Mr. Lamey: I think I will have these two marked. I will take the Court's suggestion and go to some other part of my examination and consider them later.

Court: Yes, consider them later. They may not even be admissible at all.

Q. Now, Mr. Wight, you spoke about being at a meeting in Billings, which I believe you said you thought was about 1932, at which some representatives of the Fidelity and others were present.

(Testimony of John Wight.)

Would you recall if that meeting occurred on or about the 2nd, 3rd and 4th of May, 1934?

A. I have no recollection that I did say it was in 1932. My recollection is it was in 1934. I didn't know I had made any statement that it was in 1932.

Q. Was there one or more meetings held in [104] Billings at which U.S.G.S. representatives were present, concerning these three agreements that have been set up in the answer?

A. According to my recollection now, it seems to me we had three different meetings, at least.

Q. At each of those, U.S.G.S. representatives were present, were they?

A. Yes, at each of those they were present. However, there was a meeting we did have that I don't think they were present.

Q. You have stated, I believe, that Mr. Heskett, R. M. Heskett, was present at at least one meeting?

A. I thought he was, but I wouldn't want to be sure of it. The more I think of it, the more I am in doubts Mr. Heskett was present at any of them. It seems to me he may have been present at one.

Q. Was Cecil Smith present at all?

A. Cecil Smith, I am quite sure was present at one, I know he was present at one; I think he was present at two.

Q. You said attorney Raymond Hildebrand was present?

A. I know definitely he was present at one

(Testimony of John Wight.)

meeting. I think he was present at two meetings.

Q. You were present, of course, at all meetings?

A. Yes.

Q. What about George Norbeck, was he present?

A. I am not sure he was present. I have some doubts that he was. [105]

Q. Your attorney, F. G. Huntington, was present also?

A. He was present at most of them, or perhaps all of them.

Q. Were the U. S. G. S. representatives H. J. Duncan, H. H. Perrigo, E. T. Vincent and P. J. Hegwer?

A. I have a definite recollection of Mr. Duncan and Mr. Perrigo was present at one meeting; I think they were present at two meetings. At another meeting, I think Perrigo was present; I am not such about Duncan.

Q. That was the meeting, was it not, at which you discussed these agreements, gas purchase agreement, gas unit agreement, and Fidelity Operating agreement?

A. I don't believe the Fidelity agreement or deep test agreement was discussed at those particular meetings. At those meetings, as I recall now, the unit plan was the business that was discussed. I am quite sure Perrigo and Mr. Duncan were not present at the time we discussed the terms of the Fidelity contract.

Q. Well, it was a part, or about the time of this

(Testimony of John Wight.)

over all meeting at which you discussed the other two agreements, was it not?

A. No immediate discussion of the Fidelity contract, I don't recall, was dovetailed in the discussion with the other, with the exception Montana-Dakota Utilities was offering that as an inducement for us to go ahead and execute the gas purchase agreement and the unit agreement, and we [106] would, therefore, get the deep test well, but I don't believe the Fidelity agreement was ever discussed as such in any of those meetings we had with Perrigo and Duncan, with U.S.G.S.

Q. Do you think it was discussed about the same time, but in the absence of those men?

A. Yes, it was discussed, but that was a meeting purely between myself, you might say, and M.D.U. officials, and it wasn't a subject that the U.S.G.S. had any interest in whatsoever.

Q. It is your recollection now that they took no part in any discussions pertaining to the Fidelity Operating agreement?

A. In fact, there wasn't too much discussion in regard to the Fidelity agreement anyhow; practically all the discussion was with regard to the unit agreement.

Q. Do you recall that George Norbeck was at those meetings?

A. He may have been at one of those meetings.

Q. He was a former owner of some of the lands involved in this suit?

(Testimony of John Wight.)

A. He was just holding title, not as trustee; he didn't really own them.

Q. From your testimony this morning, I understood that you have been active in obtaining leases in the Cedar Creek Anticline for many years. About when did that activity start on your part?

A. It started around about 1918. [107]

Q. And from that period on, did you obtain leases from time to time in all sections of the Cedar Creek Anticline, as represented by the plats or maps here, Exhibits 1 and 1-A?

A. Yes, I obtained leases from the south end extending down in South Dakota, North Dakota, and all the way up along the structure to Glendive.

Q. Were some of those leases taken in your own name?

A. A few of them were taken in my own name.

Q. But the greater portion were taken in the name of whom?

A. The greatest portion were originally taken in the name of Harry McDonald and D. J. Carter and Monarch—no, they were mostly in the name of D. J. Carter and Harry McDonald, and later in the Capital Gas, and then Atlantic Pacific, Herbert Stokes, possibly 30 or 40 or 50 other people.

Q. Were you more or less all working together?

A. We were all associated together at that time.

Q. Was Capital Gas Company a company in which you held some office?

A. Yes, in Capital Gas I held executive vice-

(Testimony of John Wight.)

president most of the time. George Norbeck was president.

Q. Is that company any longer active?

A. No.

Mr. Erickson: To which we are going to object because we can't see the relevancy or materiality of this line of questioning. [107A]

Court: What is the purpose of that counsel?

Mr. Lamey: The objection may be well taken.

Court: Sustained.

Q. And in the course of those dealings, I assume you took many leases and assignments of leases, did you not? A. Surely.

Q. And will you tell me whether there was a considerable amount of Government land in that Cedar Creek Anticline for leasing when you first began down there?

A. February 25, 1920, when the leasing act was passed, that opened up and made available for leasing perhaps 60 to 70 thousand acres of Government lands, or at least lands where the Government reserved the oil rights, on the Cedar Creek Anticline.

Q. There were some such lands in Unit 5, were there not?

A. Perhaps in the neighborhood of half the land in Unit 5, the oil rights were owned by the Government.

Q. I take it at that time you had experience in making applications for permits on land involved in Unit 5? A. Sure.

(Testimony of John Wight.)

Q. And made operating agreements at times with permittees on those lands in Unit 5?

Mr. Erickson: To which we object again on the grounds of relevancy and materiality.

Court: I don't see it is relevant. [108]

Mr. Lamey: I want to show his interest and knowledge here.

Court: I think he has said he was in there from 1918, owned leases himself, got leases himself and in the names of other people he was associated with, and has been continuously interested in the development there since 1918, from that time until this. I think that covers it pretty thoroughly. Let's take a short recess, well 10 minutes, until 10 minutes after 4.

(Ten-minute recess.)

Q. Mr. Wight, it is my understanding from your testimony that you knew about and were quite familiar with the drilling that was done by Fidelity beginning about 1935 and ending in 1937 on those three wells, that is, the N. P. No. 1, the Warren and the Smith No. 1?

A. I didn't have any interest in the Smith No. 1. I was somewhat interested in the original well, that is, the N. P. No. 1, to see if that would get production. I didn't pay attention at all to the Smith well, but I was vitally interested in the Warren well.

Q. Were you not interested in the N. P. 1 and Smith for the reason that if they had production,

(Testimony of John Wight.)

then, of course, it would reflect some interest in your land?

A. No, you see, I felt that oil down that far away on a separate structure wouldn't have much [109] bearing, if any on the lands I was interested in, so naturally I didn't pay much attention to the Smith well. I knew they were drilling, and that is about all.

Q. Did you feel, for instance, the later discovery in the Pine unit was of any interest to you?

A. Sure, I was interested in that well, too.

Q. Now, do you recall that commencing about May, 1941, the Carter Oil Company, under a contract with Fidelity, drilled a well on the southwest quarter of the southeast quarter, Section 9, Township 4 North, Range 62 east, which is marked on Exhibit 1-A as Carter N. P. No. 1?

A. I recall reading in the paper where Carter drilled, but I didn't know Fidelity had anything to do with the well. I never saw anything in there about whether it was drilled under a contract with Fidelity. I didn't know where they got the lease or how they got the lease, but it was so far away I didn't think it would have any bearing on where I was interested, in Unit 5.

Q. Did you later know that Husky Oil Company, in connection with Fidelity, drilled a well, commencing May, 1949, on the northeast quarter of the northeast quarter of Section 7, Township 4 North, Range 62 East, and which has been marked on Exhibit 1-A as Husky Oil N. P. No. 1?

(Testimony of John Wight.)

Mr. Erickson: To which we object on the ground there is no proper foundation, and for the second [110] reason that the question is incompetent, irrelevant and immaterial, and serves to illustrate no issues in this case.

Court: I don't understand what you are driving at, counsel.

Mr. Lamey: Well, the subsequent drilling that was done in conjunction with Fidelity on this Cedar Creek Anticline in attempting to develop these lower horizons.

Court: Under these agreements?

Mr. Lamey: That's right.

Court: The Husky well?

Mr. Lamey: That's right. It has been religiously avoided in the testimony. It would appear up until now there were only three wells drilled by Fidelity. Under contract with Carter, Carter drilled a well under the Fidelity agreement, and Husky later drilled a well under the Fidelity agreement.

Court: You may examine him if he knew about it.

Mr. Erickson: We make the further objection it is improper cross examination, and further it is an attempt to vary the terms of the written agreement.

Court: I don't think it is improper cross examination. He is talking about what he did know and didn't know other things. He can develop that.

A. I remember reading in the oil paper where Husky was starting to drill a well. I didn't pay any attention because it was so far away to have any bearing on the land I was interested [111] in, Unit

(Testimony of John Wight.)

5. It wasn't proving or disproving any additional territory that I could see, so I didn't pay any attention to the Husky well, and I did not know that Fidelity had any connection with the Husky well. I assumed that Husky went out and picked up its lease and drilled a well on its own.

Q. I take it then you didn't have enough interest in either of those wells or the drilling of them to make any inquiry?

A. No, I didn't have enough interest to make any inquiry at all. I just noticed it in the paper and that was all.

Q. And I assume that you noticed these paper reports about the time the wells were being drilled?

A. Yes, I glance over them. Dozens and dozens of wells are drilling in Montana. I just observe the notations in the paper to see how close it is to something I may be interested in.

Q. Let's go back to the Susan Wight lands just a minute, in Unit 5. Is there a production of gas from those lands?

A. I don't think so.

Q. Gas has been produced from them, has it not?

A. Not that I know of—it is in the unit plan, yes.

Q. Yes, it is in the unit plan.

A. Yes.

Q. You spoke here awhile ago of some monthly reports of payments for gas? [112]

A. That's right.

Q. Are those payments attributable to the Susan Wight lands?

A. Yes, in Unit 5.

Q. Now, have there been any operations on

(Testimony of John Wight.)

there, either for oil or gas, other than these gas operations within the unit, under that gas unit plan since, say 1935?

A. The only operation that I know of in Unit 5 was that well they drilled in 1936 and abandoned in 1937, what we call the deep test well drilled for oil. However, I have noticed from time to time where there has been several Eagle sand wells drilled in Unit 5, and a few additional Judith River gas wells.

Q. Who drilled those wells?

A. The Montana-Dakota Utilities, in the reports I saw, drilled the Judith sand wells; I don't recall who drilled the Eagle sand wells.

Q. At any rate, they were drilled in connection with the gas unit operation?

A. No, not the Eagle sands, the Eagle sands weren't unitized. Neither Mrs. Wight nor anyone I know of gets any benefit from an Eagle sand well.

Q. Do you have any agency agreement with Cedar Creek, other than, let's exclude the agreement identified here awhile ago as Exhibit 17?

A. No, I don't. [113]

Q. You have mentioned, however, that you are sort of a representative of that company in this Cedar Creek area.

A. More as an old time friend just to help them look after their interests as best they can. I don't charge them anything for it. More or less being on the ground, and being old friends, more or less, I have taken the responsibility of trying to watch their interests.

(Testimony of John Wight.)

Mr. Lamey: Do you have the original of this?

Q. Mr. Wight, we show you the Defendants' Proposed Exhibit 20, and I will ask you whether you signed that original letter dated September 12, 1952, and directed to George H. Seivers, Secretary and Treasurer of Cedar Creek Oil and Gas Company? A. I did.

Q. I call your attention to the last paragraph on page 1 wherein reference is made to a sheet attached thereto. We don't have in the depositions anywhere that sheet or a copy of it. Are you able to identify it and produce one? I would ask you to read that paragraph.

A. Which paragraph is that again?

Q. That last paragraph on page 1 of this proposed exhibit.

A. I don't believe I enclosed that sheet. However, I can identify it from the contract itself.

Q. Going back to the exhibit, you did write the letter on the date indicated? [114]

A. That's right.

Q. And in connection with that letter, did you send another form which I am about to show you now, Defendants' Proposed Exhibit No. 21?

A. I wouldn't say this is exactly the form I prepared, but I would say it is substantially in the form I prepared and mailed out.

Q. Was that letter and its enclosure written and prepared as part of your relationship, this friendly relationship with Cedar Creek Oil?

A. I would say yes.

(Testimony of John Wight.)

Q. And did it have to do with the lands that are involved in this suit in the causes of action in which Cedar Creek is interested? A. That's right.

Mr. Lamey: We offer these exhibits, 20 and 21, in evidence.

Mr. Erickson: May I see 21? We have no objection to Exhibit 21. We have no objection to Defendants' Exhibit 20 insofar as it is the letter of Mr. Wight addressed to George H. Seivers. We do, however, have objection to the relevancy of Defendants' Exhibit 20, and we also point out Paragraph 4, particularly, on the first page and raise the question of whether the exhibit does not have the effect, which has been disapproved by the Court, of amounting to a variance of the [115] terms of the contract by interpretation. It is only to relevancy and to that point that we raise the objection.

Court: The objection is overruled, and they are admitted.

(Defendants' Exhibit 20 and 21 admitted in evidence.)

Q. I would like to have the witness refer to the letter. I believe that is Exhibit 20, is it not? Now, Mr. Wight, again calling your attention to the last paragraph where you made reference, which reads "as per sheet attached hereto". I believe you stated you did not know where that sheet might be, but you could identify the paragraph to which you referred from the agreement? A. That's right.

Q. Do you mean the Fidelity operating agreement? A. That's right.

(Testimony of John Wight.)

Q. We will show you Exhibit 2 which has been introduced as a copy of that agreement. I will ask you to pick out the portion to which you made reference in this letter, Exhibit 20?

A. Well, it is the last part of Section 2 on page 2—Section 2 on page 2.

Q. Are you referring to the part which begins with the words "Forfeiture of all rights"?

A. That's right.

Q. I will read to you what that sentence says, and then I will ask you to tell me whether or not that is the sentence [116] you referred to, "Forfeiture of all of the rights of second party as to respective lands upon which it shall be in default in the performance of the drilling, operating or producing obligations under this agreement and its failure to proceed to remedy such default within 30 days after receipt of written notice from first party thereof, shall be the exclusive remedy of first party against second party on account of any such default hereunder; and default in drilling of the test well as hereinafter provided shall be deemed default as to all of the lands subject thereto." Is that the part you refer to in the letter?

A. That is the part I refer to.

Q. Now, in the first paragraph of that letter, Exhibit 20, you stated, "About 60 days ago a representative of Shell Oil Company came into my office and wanted to make a deal to lease the oil rights covering our lands in Unit 5." Now, by "our lands",

(Testimony of John Wight.)

do you mean all of the lands that are involved in this suit? A. That's right.

Q. Now, who was that representative of Shell Oil Company who came to see you about 60 days prior to September 12, 1952, and wanted to lease all of these lands in Unit 5?

A. It was either Mr. Gadbois or the other gentleman that I referred to that I don't remember his name with the leasing department of Shell. [117]

Q. And which one of the visits of the two or three that you referred to might this one have been early in July of 1952, the first, second or third?

A. It was either the first or second. It couldn't have been the third, because the third is when I got turned down.

Q. What is your best recollection now, having seen this letter of September 12, 1952, as to whether it is the first visit?

A. No, I guess you are right, I am wrong. This was after the third meeting, I think you are right. Yes, this letter was written after the third meeting.

Q. And would you say that the Shell representative had not yet told you about the Fidelity operating agreement with Shell at the time of this letter?

A. At the time of this letter, that is evidently after the third meeting when the Shell man told me Fidelity were claiming the oil rights.

Q. I call your attention again to the language which says, "A representative of Shell Oil Company came into my office and wanted to make a deal to

(Testimony of John Wight.)

lease the oil rights covering our land in Unit 5.” Now, do you still insist that is the time he turned you down?

A. In that first paragraph, evidently I was referring to the fact the Shell man had been in and made an offer, and later came in, in the second paragraph it would naturally [118] lead me to believe he had turned me down, and I was writing the letter out to Seivers and H. C. Smith because I had been turned down from making a deal with Shell.

Q. This letter was intended to tell Seivers that Shell had turned you down, is that right?

Mr. Erickson: To which I am going to object to the examination on the letter. The letter speaks for itself, it is there.

Mr. Lamey: I want to give the witness a chance to explain, if he can.

Court: Proceed. I will overrule the objection.

A. I can't tell you at this moment what was in my mind at that particular time as far as all phases of the letter, but refreshing my recollection the best I can from reading the letter, it is my recollection I intended to tell Mr. Seivers or apprise him of the fact I had been made a tentative offer and later on the Shell man came in and said he couldn't make the deal and that Fidelity claimed the oil rights.

Q. Mr. Wight, did Shell ever make you an offer on the Susan Wight land, or any other lands involved in this lawsuit?

A. I wouldn't say they made an offer; they indicated they were interested. I did quote a price. I am

(Testimony of John Wight.)

not saying they accepted it, but they indicated they were interested. I thought there was a pretty good chance I had a deal made to get a well drilled. [119]

Q. Now, coming to the third paragraph in that letter, it states, "About three years ago we sent out notices to the M.D.U. stating that all of the rights which they might claim by virtue of the old operating agreements and unit agreements entered into in 1934 and 1935 in respect to the deep rights were no longer valid by reason of the fact that the terms and conditions have been in default for nearly fifteen years." Who do you mean by "we" sent out notices?

A. That would be Susan M. Wight and the International Trust and I suppose W. B. Haney and H. C. Smith. Now, it is my recollection now I had sent similar notices to the Cedar Creek Oil and Gas Company. I may not have sent those original notices, however.

Q. Going back to International Trust, Mr. Wight, do you not know as a fact that International Trust never sent out any notice that you suggested it send to M.D.U. or Fidelity?

A. I am not so sure about that. It is my recollection they did. Now, they may not have, but it is my recollection they did.

Q. Now, were you referring in this letter to a form of notice that has been introduced as Plaintiffs' Exhibit 15, which is in blank, except for the year date, 1949?

A. No, that didn't refer to the same notice.

Q. All right, will you produce the notice you are

(Testimony of John Wight.)

referring to in this paragraph of Exhibit 20 that was sent out three [120] years in advance of this letter?

Mr. Erickson: May I inquire, Mr. Wight, off the record so maybe we can locate what it is he wants, or I can inquire on the record, I don't care.

Court: If it is agreeable to counsel. I don't think you can interrupt counsel's cross examination.

Mr. Lamey: I would like to continue my examination.

Q. You note that the notice in 1949, which I believe you have testified was sent out by Susan Wight, is that right?

A. Yes, this notice dated 1949 was, to the best of my recollection, was sent out to be signed by the International Trust, H. C. Smith, W. B. Haney and the Cedar Creek Oil and Gas and Susan M. Wight. That is the best of my recollection. However, there was another notice.

Q. There is another notice later that I will come to referred to in this letter, Exhibit 20. You might look at that.

A. Unfortunately I don't seem to have a copy available.

Q. Do you recall that the notice which is here dated 1949 was not sent in to the M.D.U. or Fidelity by Susan Wight until July sometime in 1951?

A. Yes, I have some recollection it wasn't sent in for a year or so after this date.

Q. Now, will you refer to Exhibit 21, which is the form of notice, and I will ask you if that is the

(Testimony of John Wight.)

form of notice, or substantially the form that you sent in with your letter of [121] September 12, 1952, to Seivers?

A. I would say it is substantially the same; I am not sure it is exactly the same.

Q. You would say it is substantially the same, as I understand it?

A. I would say it is, substantially, yes.

Q. Now, I would like to have you refer to the second paragraph of your letter which is marked Exhibit 20, which begins, "You should be careful, though, if you change any of the wording so you are not declaring a forfeiture at this time." In that paragraph were you referring to this form of notice which you were sending, which has been identified herein as Exhibit 21?

A. No, I don't think I was—oh, wait a minute—yes—no, it seemed to me like it was a notice sent out prior to this prepared along this general line at about the same time Exhibit 15 was prepared. In fact, I was under the impression they were both sent out at the same time.

Q. You are speaking now about Exhibit 21?

A. Yes, it seems to me, as I recall it, that Exhibit 21 and Exhibit 15—I mean I prepared a similar notice to Exhibit 21 at the same time I prepared the 1949 notice under Exhibit 15.

Q. Now, in this paragraph to which I have just called your attention, number 2 on the top of page 2 of Exhibit 20, you indicate that they should not make any changes so that "you [122] are not de-

(Testimony of John Wight.)

claring a forfeiture", and by "forfeiture", did you have reference to that portion of paragraph 2 of the Fidelity operating agreement to which you have just testified?

Mr. Erickson: To which I am going to object. I believe all this line of testimony is incompetent, irrelevant and immaterial, it doesn't serve to illustrate any issue in this case. I don't see the materiality of it.

Mr. Lamey: Your Honor, I am approaching it on the basis of interest and bias, just what he had to do in getting this together. I am going to bring it up to the time of this suit. This is preliminary to it.

Court: Well, I don't see that it has any materiality with reference to his interest in the matter, this particular line of questioning.

Mr. Lamey: The thing, sir, he is giving them instructions as to how to get around this provision in this agreement, you understand; he is furnishing the brains or the motivating power, so to speak, as to just what kind of notice he wants sent out. It seems to me it shows interest.

Court: Very well, you may proceed along that line.

Mr. Erickson: I would like to make the further observation, your Honor, the questions that have now been asked by counsel put it up to this witness to interpret the contract. Obviously, if we go into this line of testimony further, then the door is open to unlimited examination of this witness as [123]

(Testimony of John Wight.)

to his interpretation of the contract. I don't believe you can open it for the purpose of trying to show bias and still close the door for the purpose of further examination.

Court: That may very well be true, I am not sure, Judge. That very often happens, upon cross examination a field is opened up that permits you to go ahead. That may have happened here, I don't know, but on the other hand, it is also possible for counsel to examine this witness to show what was done in pursuance of their rights or claimed rights under the contract, and so I'll permit the examination. We will arrive at a determination of the other point later.

Q. I will put another question to you. Before you said you prepared a notice and sent it out to these people of your group in 1949?

A. I prepared it in 1949, but apparently it wasn't sent out at that time. I thought it was, but apparently it wasn't.

Q. You are referring to some notice other than Exhibit 21?

A. As I just testified a minute ago, it was my recollection I had prepared another notice similar to Exhibit 21 at the same time I prepared the notice in Exhibit 15.

Q. Well, Exhibit 15 must have been prepared in 1949, would you say?

A. Yes, it was prepared in 1949.

Q. Now, at that time you were firmly convinced

(Testimony of John Wight.)

that Fidelity was not claiming any interest under the agreement, were you [124] not?

A. I hadn't heard that they had, but I knew enough about them, I knew they would if they could. I didn't intend to let them claim anything they didn't have a right to claim. I wanted to close the door before they made a claim.

Q. That was in 1949?

A. I knew them well enough to know they would grab on to anything. As soon as Amerada discovered oil in North Dakota, I knew if there was any chance, they would be in to claim.

Q. Was it 1949 that Amerada discovered oil in North Dakota? I will give you the date of May, 1951. Was that the first discovery made by Amerada in North Dakota?

A. They started drilling in 1949.

Q. So, in 1949, then you thought Fidelity might be claiming some interest under this agreement?

A. As soon as it rather looked like it was becoming valuable, as soon as Amerada was going to drill, I knew if there was any chance of Fidelity or Montana-Dakota Utilities thinking they could claim it, they would do it. I thought I could forestall any claim they might put out. I didn't think they had a legal claim or right. I didn't know what a Court would decide. I thought they were out, defaulted, abandoned it.

Q. So, you then prepared some notice and sent it out to your group other than the two forms that have been introduced here so far, is that right?

(Testimony of John Wight.)

A. There was only two paragraphs in all of the contracts where I could find out there was a possible chance that M.D.U. or Fidelity could claim any rights. One of them was under the unit agreement where they had the option to unitize the lower sands; the other was in Section 2 of the Fidelity contract on page 2 in regard to the forfeiture, so in order to foreclose any possibility that the Fidelity Gas or M.D.U. could claim any rights thereunder, which I didn't want them claiming any rights they weren't legally entitled to, I had lost about \$80,000 and didn't want to lose any more to M.D.U., I did everything I did to close the door, to forestall them from claiming rights. That is why I had the notices prepared.

Q. That was long before Mr. Gadbois saw you?

A. It was.

Q. Now, did you send a form substantially the same as Exhibit 20 to the International Trust Company with the suggestion that it be sent out?

A. I think I did.

Q. And what about to Mr. Smith and Mr. Haney?

A. I was under the impression that I sent out a copy to Smith and Haney and International Trust and Mr. Seivers.

Q. And was this all part of your friendly relationship with this group?

A. There was three reasons for that, Mr. Lamey. One of them was my friendship and relationships with Seivers and Cedar Creek [126] and Haney and

(Testimony of John Wight.)

those people. The other was I knew if I got the land back, just a small amount of land like the Susan M. Wight land, there wasn't a chance in a hundred to get a well drilled eight to ten thousand feet deep, I would have to get some more land back. I had a selfish interest for my efforts. If I had a larger block of land, I would have a better chance to get a deep well drilled. The third reason was that Montana-Dakota had taken away from me about 80,000 acres, and I intended to see they didn't take another acre they weren't legally entitled to. Those are the three reasons.

Q. You sent that last notice, Exhibit 21 out about the same time as Exhibit 20, in September, 1952, is that correct?

A. Yes, I was under the impression, however, that I had previously sent out similar notices.

Q. Pardon.

A. I was under the impression I had sent out a year or so earlier than that a similar notice, but apparently I haven't.

Q. But you did send this notice you have just referred to, this notice, Exhibit 21, out about September 12, 1952? A. That's right.

Q. At that time, you knew, did you not, that Shell had discovered oil in the Pine area in the north of the Cedar Creek Anticline?

A. If they had discovered it, I knew it. I can't say the date. If they had discovered it, I would know it. [127]

(Testimony of John Wight.)

Q. It appears they completed Little Beaver well No. 1 July 30, 1951.

A. Yes, but that wouldn't be a discovery; that would be an extension of an old field; that wouldn't add or detract very much to the whole picture.

Q. Why, because of previous drilling?

A. Yes, previous drilling; they proved there was oil already there by previous drilling.

Q. Now, referring again to Exhibit 20, that letter. In the last paragraph you stated, "It may be necessary for us to join together to start another action to quiet title against the oil rights." Now, did you have reference to this action which was subsequently started?

A. That's right, that is what I had in mind. Then it developed into this action now pending.

Q. You also stated, "I am not certain that the present action we have pending covers that phase of the matter thoroughly enough." To what action are you referring?

A. That is the action to set the unit aside. That was the action we had pending, which is still pending, which I understand is still pending, to set the unit agreement aside.

Q. In the state court?

A. In the state court.

Q. In what county, do you recall?

A. I believe that is in Custer County. [128]

Q. Mr. Wight, you have testified that sometime after the Warren well was completed, that you made a trip to Minneapolis to see Mr. Heskett, pri-

(Testimony of John Wight.)

marily with reference to some further drilling in that well? A. That's right.

Q. Did anyone go with you on that trip?

A. I don't think so.

Q. What about Mr. Norbeck?

A. I don't believe he was with me on that trip; he may have been, but I don't recall right at this time.

Q. In your testimony this morning, I gained the impression that all of your conversations with Heskett and Smith were with them alone, and with no one else present?

A. I am not so sure. That is so long ago, I can't recall. Norbeck may have been present one time at one meeting, but at this particular moment, I don't seem to have a recollection that he was. I am not saying he wasn't.

Q. Mr. Wight, I call your attention to page 25 of your deposition taken June 11, 1953, in Billings, and at the top of the page, beginning with the question, "In whose office?" I will ask you whether at that time of your deposition, you testified as follows: "Question, In whose office? Answer, I talked with Mr. Heskett in his office there quite a long time. Question, Who was present? Answer, On one of our meetings George Norbeck was present, and one of the other [129] meetings a man by the name of B. E. Terry was present. Question, He was formerly president of Montana Eastern Pipe Line Company? Answer, That's right." Did you at that time so testify? A. I did.

(Testimony of John Wight.)

Q. Does that now refresh your recollection that George Norbeck was present at one conversation with Mr. Heskett?

A. At the time I made the deposition, previous to that, I had been looking through our files and anything I could to refresh my memory, so I must at that time have had something there that Norbeck was present. I said now I didn't recall at this moment that he was present, but he might have been.

Q. What about B. E. Terry?

A. Terry lived in Minneapolis. I remember several times I met Mr. Terry and we went up to Mr. Heskett's office, so evidently he was present, too, at one meeting.

Q. Can you recall at this time anyone else who may have been present?

A. No, I don't think so. In fact, most of my meetings with Heskett, I was alone. Very few times I had anyone with me when I would meet Mr. Heskett or Mr. Smith.

Q. Is George Norbeck dead?

A. Yes, he is dead.

Q. Is B. E. Terry dead?

A. I think he is; I heard he was, but I am not sure. [130]

Q. Now, give us your best recollection of the date on which you went to Minneapolis to see Mr. Heskett with reference to the Warren well?

A. After looking through whatever records and files that I thought would refresh my memory in the last week or two, I am now of the opinion the first

(Testimony of John Wight.)

meeting I went to see Mr. Heskett was possibly either just before they abandoned the well, or just after they abandoned the Warren well, because it is my recollection at this time I went down to see him at the time I heard they were going to abandon the well, but at that time I don't believe they had fully abandoned it.

Q. All right, what year was that?

A. The first part, evidently, of 1937.

Q. Could it have been in the spring of 1938?

A. I did go down there in the spring of 1938 and talk to Mr. Heskett. I remember that very distinctly. That was apparently a year after the well had been abandoned.

Q. That you went down there?

A. Yes. As I say, I remember going down right after the well, or when the well was being abandoned, and I remember going down eight or nine months or a year after that to see if I couldn't get him to change his mind.

Q. You think you were down there in the spring of 1937, and also in the spring of 1938?

A. Yes; I would say definitely it would be winter or early [131] spring of 1937, then in the fall of 1937, then again during 1938.

Q. On each of those occasions you talked to Mr. Heskett about the Warren well?

A. Mr. Heskett, and also once or twice, maybe three times, I talked to Mr. Smith.

Q. All right. I would have you refer to page 24 of your deposition which has been heretofore iden-

(Testimony of John Wight.)

tified, and referring to your examination then with reference to conversations with Heskett and Smith, I will ask you if you testified to the question, "Where"—do you find that about 10 lines down?

A. Yes.

Q. And the answer, "In their office in Minneapolis. Question, When? Answer, It was the spring of 1937, or could have been in the spring of 1938. Question, Either in the spring of 1937, or the spring of 1938? Answer, I didn't put down the date, but I do know this, and I definitely can identify it from the time they made the announcement— Question, What announcement? Answer, The announcement they were plugging and abandoning that well." Did you so testify? A. That's right.

Q. By "that well" that you have referred to here, are you referring to the Warren well?

A. The Warren well, yes.

Q. What is your best recollection now of just when you were [132] down there the first time to talk to Heskett and Smith?

A. Since we have definitely determined now that the well was abandoned in January, 1937, I would say definitely I was down there in the early spring of 1937, about the time, as I say, the well was being abandoned. That is the first trip. Then I made another trip four or five or six months after that.

Q. I noticed this morning when Judge Erickson was questioning you on these dates, you referred to some memoranda, checks or something else?

(Testimony of John Wight.)

A. Yes.

Q. Now, do you have any such memoranda that would help you in fixing this first visit or date?

A. Well, I have one cancelled check here of April 8, 1938, given to the Nicollet Hotel. That was the spring of 1938. That was one of the trips down there endeavoring to get Mr. Heskett to reconsider and drill deeper. I didn't find any cancelled checks for 1937. However, in August, 1937——

Q. I would like to see that? Is that those two? Get the two of them if those are what he is basing his previous testimony on.

A. I am not basing my testimony entirely on those checks, only as to two dates.

Q. I notice that the second check to which you refer to the Powhatan Hotel is dated August 13, 1937. Does that indicate something to you with reference to these conversations? [133]

A. Yes, I remember definitely before I went to Washington, D. C. on that trip, I stopped in Minneapolis and conferred with Mr. Heskett about deepening the well or drilling another well, and then I went on to Washington, D. C. to see what I could do about raising some money and to New York.

Court: I think it is time for a recess, counsel. Court will stand in recess until 10 o'clock tomorrow morning.

(Whereupon, a recess was taken until the following morning, April 14, 1955, at 10 o'clock, A.M., at which time the following proceedings were had:)

No. 15293

United States
Court of Appeals
for the Ninth Circuit

CEDAR CREEK OIL AND GAS COMPANY,
a corporation, INTERNATIONAL TRUST
COMPANY, a corporation, H. C. SMITH,
SUSAN M. WIGHT and W. B. HANEY,
Appellants,

vs.

FIDELITY GAS COMPANY, a corporation,
MONTANA-DAKOTA UTILITIES COM-
PANY, a corporation, and SHELL OIL
COMPANY, a corporation, Appellees.

Transcript of Record

In Two Volumes

VOLUME II.

(Pages 345 to 713, inclusive)

Appeal from the United States District Court
for the District of Montana
Billings Division

FILED

JAN 23 1957

PAUL P. O'BRIEN, CLERK



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(Testimony of John Wight.)

Q. Mr. Wight, about the time we concluded yesterday, some reference had been made to a check given in August, 1937, to the Powhatan Hotel.

A. Right.

Q. Where is that hotel located?

A. That is in Washington, D. C.

Q. Mr. Wight, when you first made your trip to Minneapolis to see Mr. Heskett and Mr. Smith with reference to the Warren well, which I think you fixed as early in 1957 or 1951——

A. 1937.

Q. How long did you remain there—I am sorry, 1937?

A. Yes, 1937. It is my recollection somewhere between a week and 10 days.

Q. And I believe when your deposition was taken here in Billings on July 11, 1953, you testified to that effect, that you had been there for about a week? [134]

A. I think so, that is my recollection now.

Q. And, if you want to look at your deposition, you may, but do you also recall when that deposition was taken that you went on to relate the conversations that you had with Mr. Heskett and Mr. Smith during that visit?

A. That's right.

Q. I would like to have the deposition made available to the witness, please, Mr. Johnson. Mr. Wight, I will ask you to look at page 26, especially, and what I have been examining you about took place on the pages just preceding. Now, I will ask you whether or not at the time this deposition was taken, that you testified as follows, that is at the

(Testimony of John Wight.)

bottom of the page, the last question on the page, "Question, Did you have more than one conversation with Mr. Heskett? Answer, It is my recollection that during approximately the week I stayed in Minneapolis on that trip that I had three or four conversations with Mr. Heskett, but I can't tell you how many I had because I know I had practically nothing else to do there at that time but confer with Heskett and Smith. I know we spent about a week there at that time." Did you so testify then at that time? A. That's right.

Q. I have been unable to find in your deposition anywhere where you made any reference to any other visit with Heskett or Smith concerning this subject later in 1937 or early in [135] 1938. Do you find any? A. I would have to——

Q. Well, do you recall any, I know it is not there?

A. Yes, since I gave my deposition, I have been going through a lot of our old files and trying to refresh my memory the best I could, and in doing so, I have a quite distinct recollection of being in Minneapolis in the fall of 1937, at which time I again, I remember, conferred with Mr. Heskett and, I think, Mr. Smith, and then it is also my recollection that the following year I stopped in there and also discussed the matter with them.

Q. That information has been brought to your mind since your deposition was taken in 1953, is that right?

A. Yes, if it isn't in the deposition. I don't re-

(Testimony of John Wight.)

member now whether I did so testify in my deposition. If I didn't, then, the reason I would testify to that now is because from the information I have been able to find in my files which would refresh my memory to a point of where now I was satisfied I was in Minneapolis in the fall of 1937 and also in 1938.

Q. Did you not make an effort at the time your deposition was taken to refresh your memory as to conversations and dates?

A. I didn't have quite enough time at that time to go through my old files. In fact, there was still a lot of my old files stored away that I haven't had a chance to go through yet.

Q. Do I recall correctly your testimony of yesterday when I [136] called your attention to the fact that perhaps Terry and Norbeck were present that you then told me that you remembered that back when your deposition was taken because you had made a review of your records and files?

A. Some of them, but as I say, before I took the deposition, I didn't have time enough to go through very many old files to try to refresh my memory. I know I am very poor when it comes to remembering dates. I thought always I was very good on details, but not on dates.

Q. Mr. Wight, showing you the Defendants' Proposed Exhibit 18, I will ask you to examine it and tell me whether your signature appears thereon? A. It does.

Q. And what other signature is there?

(Testimony of John Wight.)

A. H. C. Smith.

Q. And is he the same person who is one of the plaintiffs in this case? A. He is.

Q. Yesterday on direct examination, you testified that you had an indirect interest in the H. C. Smith property, did you not?

A. Proceeds. I didn't intend to say I had an interest in the property, in the proceeds.

Q. Does the document, Exhibit 18, which you are now examining cover or describe the interest that you have? [137] A. It does.

Q. And is that the only writing that you have describing your interest in the H. C. Smith profits or properties?

A. I am quite sure it is. I don't recall of having any other instrument or document of any kind.

Q. I now show you Defendants' Proposed Exhibit 19, and will ask you if you signed that?

A. I did.

Q. And what other signature is on the letter or agreement? A. W. B. Haney.

Q. And is he the same person, W. B. Haney who appears as plaintiff in this case? A. It is.

Q. You testified on direct examination you had an indirect interest in the properties or profits of Mr. Haney, the plaintiff in this suit?

A. That's right.

Q. Does Exhibit 19 represent or describe the interest that you have indirectly in the cause of action of W. B. Haney? A. It does.

Q. Do you have any other agreement with W. B.

(Testimony of John Wight.)

Haney which in any way describes or sets forth an interest you may have in his cause of action?

A. No other agreement.

Mr. Lamey: Now, may it please the Court, I renew the [138] offer of Exhibit 17 and now offer in evidence Exhibits 18 and 19 for the purpose of showing the interest of this witness in the outcome of this litigation.

Court: Any objection?

Mr. Erickson: Just a minute. For the purposes for which they are offered, we have no objection.

Court: Very well, they are admitted.

(Defendants' Exhibits 17, 18 and 19 admitted in evidence.)

Q. Mr. Wight, on page 3 of Exhibit 17, there appears this language, "It is understood that second party has already made a commitment promising to assign a twenty-two percent contingent interest to certain parties who did agree to finance said litigation," end of that quotation. Now, who are those certain parties?

Mr. Erickson: To which we are going to object because it is improper cross examination, there is no testimony as to any other agreements, it is incompetent, irrelevant and immaterial, and it is outside the purpose for which the document is introduced.

Mr. Lamey: That would depend, your Honor, on the person to whom these assignments were made. It appears in the document, it is in evidence. I don't think we would be able to understand it without

(Testimony of John Wight.)

information—all I am asking is the name of the persons, and I can tell whether it is relevant.

Court: The objection is overruled. [139]

A. I had a commitment made with a man by the name of Gordon Butterfield. However, as the agreement was later prepared, it excluded this case and applied to the so-called 30 million dollar action which I had pending at that time against the M.D.U. which was later dismissed, or pertaining to both damage actions. Originally it was going to include all litigation that I would have or did have against the M.D.U., but as finally drawn up, it excluded, or didn't include this pending litigation we are in now.

Q. So then as far as this agreement refers to certain other parties who might have a 22 per cent contingent interest, that is no longer effective?

A. Not as to this particular case.

Mr. Lamey: You may cross examine, or redirect, I am sorry.

Redirect Examination

Q. (By Mr. Erickson): Mr. Lamey has asked you, Mr. Wight, about the circumstances under which in the deposition you testified to only one trip to Minneapolis, and now you testify to more; calling your attention to the check which I believe should be put in evidence because there is so many references to it, the check having been marked Plaintiffs' Exhibit 22, and which is now offered——

Mr. Lamey: No objection.

Court: Admitted.

(Testimony of John Wight.)

(Plaintiffs' Exhibit 22 admitted in evidence.)

Q. Did you discover that check after the time the deposition was taken? A. I did.

Q. And did it serve to bring to your memory a second trip you made to Minneapolis?

A. It did.

Q. And under the circumstances related on your direct examination? A. That's right.

Q. And on the direct examination, I believe you testified you stopped in Minneapolis on your way to Washington, is that correct? A. That's right.

Q. Did you testify you stopped on your way back also? A. On my way back also.

Q. I call your attention to a check dated April 8, 1938, made payable to the Hotel Nicollet, which has been marked as Plaintiffs' Proposed Exhibit 23, and will ask you if that is a cancelled check you had in your possession? A. It is.

Q. Did you discover that check also after the time of the deposition? [141] A. I did.

Q. And that check was given to the Hotel Nicollet at Minneapolis, is that correct?

A. That's right.

Q. Was it given to the hotel at a time you were in Minneapolis?

A. At a time when I was in Minneapolis.

Q. It is drawn on a form of check blank where the name of the bank is typed in, is that correct?

A. That's right.

Q. Did you secure that at the hotel?

A. I did.

(Testimony of John Wight.)

Q. And with relation to this check, would that also serve to refresh your memory as to the third trip as you have testified on direct? A. It did.

Q. Your testimony was that at the time of the 1938 trip, in the spring, you also had a discussion with Mr. Heskett and probably Mr. Smith, is that right? A. That's right.

Mr. Erickson: We now offer Plaintiffs' Exhibit 23.

Mr. Lamey: No objection.

Court: Admitted.

(Plaintiffs' Exhibit 23 admitted in evidence.)

Q. Calling your attention, Mr. Wight, to Defendants' Exhibit 20, counsel asked you to explain your purpose in writing the [142] language contained in the fourth paragraph of the first page of that exhibit, or, Mr. Wight, that should be the second paragraph on page 2. Will you examine that paragraph? You have now read paragraph 2 on the second page? A. Yes.

Q. That is the paragraph that has to do with a caution to the receiver of the letter as to the declaration of a forfeiture, is that correct?

A. That's right.

Q. Mr. Wight, when you wrote that language, what was your purpose?

Mr. Lamey: May it please the Court, at that time yesterday when I asked that question, counsel objected to it, and then we had some discussion with reference to it. The question was never answered, and I went on with another question, and

(Testimony of John Wight.)

I now object to it as improper cross examination, cross examination on a point to which counsel himself objected when it came up in Court; that is when we had the discussion as to whether or not that would open up some interpretation of the agreement, as the Court will remember.

Court: Well, I'll overrule the objection. You may answer the question, and the Court won't consider the evidence as being an interpretation or changing or varying the terms of the contract, but to explain and show the state of mind of the parties and what they did and how they acted under the [143] agreement. For that purpose I will admit it.

Mr. Erickson: That is satisfactory to the plaintiffs.

Mr. Lamey: Read the question, please?

(Question read back by reporter.)

Q. Will you tell us what your purpose was?

A. I did not think that the Fidelity or that the Fidelity Company had any rights left under the contract, but I didn't know how they might interpret it. I did not want to reinstate any rights that they had defaulted on, in my opinion, for 15 years, by giving them some notice which might possibly have an effect of giving them the right then to come in and cure some apparent defect, which I didn't think existed, so I naturally cautioned my group to be very careful in wording the cancellation notice in such a way that Fidelity Gas Company could not interpret the notice as giving them

(Testimony of John Wight.)

the right to have 30 days to come in and cure something I didn't think they could anyhow.

Q. You are referring to 30 days, does that have reference to some language in the so-called operating agreement, exhibit 2? A. It does.

Q. Can you tell us by looking at the contract what paragraph that has reference to, and what language?

A. It is the last part of Paragraph 2 on page 2 of the Fidelity contract. This is the language: "Forfeiture of all [144] of the rights of second party as to respective lands upon which it shall be in default in the performance of the drilling, operating or producing obligations under this agreement and its failure to proceed to remedy such default within 30 days after receipt of written notice from first party thereof, shall be the exclusive remedy of first party against second party on account of any such default hereunder."

Q. That is the language you had in mind when you wrote that?

A. That is definitely the part of the contract I had in mind when I cautioned my group not to send out any notice which could be possibly construed by the Fidelity Gas Company as recognizing that they might possibly have some rights under that paragraph.

Q. In sending out the form of notice that you asked your group to sign, why didn't you take the position that the forfeiture had to be declared under that section?

(Testimony of John Wight.)

A. Because there was only one obligation that Fidelity Gas Company had, and that was to drill one well, then if they got a producer, then they had the second obligation to produce.

Mr. Lamey: May we object to this testimony? The document itself is in, it is the best evidence. This is an opinion being volunteered by the witness, incompetent, irrelevant and immaterial.

Court: It is incompetent and irrelevant insofar as interpretation of the contract is concerned, but for the purpose [145] for which counsel is questioning, the objection is overruled, just to show the circumstances and the state of mind of the party in his negotiations and operations.

Mr. Erickson: That is the extent, and for that purpose only do we offer it.

A. In preparing the——

Court: In other words, what he says the contract means——

Mr. Lamey: Trying to explain the letter, is that right?

Court: Yes.

A. In writing this letter, I had in mind my view of the contract which was that Fidelity Gas Company had fully complied with the terms and conditions of that contract, that we had no right to obligate or require them to go any further so long as they had drilled one well in accordance with the contract and hadn't encountered any production, and there was no further obligation to drill. They were not in default in drilling, and they

(Testimony of John Wight.)

didn't get production, so they were not in default on production, so, therefore, I figured the contract was dead, and I didn't want to do anything to possibly revive it.

Q. So, that in your mind at the time you prepared the cancellation, you understood this language didn't apply to a situation where the deep test had been drilled, and nothing further done, is that correct?

A. As I said before, I figured the contract had been lived [146] up to and expired and was no longer in force and effect, and there was no further obligations they had, and I didn't want to say or do anything that could reinstate something I thought had been dead for 15 years.

Q. When you say they lived up to the contract, you mean they drilled the first test well?

Mr. Lamey: Object to that as leading.

Court: Sustained.

Q. When you spoke of them having lived up to the contract, what did you mean by that?

A. Under the terms of the contract, as I understood it, they obligated themselves to do two things, first to drill a well in the south end of the field, which they did; then if they got production there, they had the option to drill a second well, which they promised verbally to drill on Unit 5, which they did, they drilled the second well, so they complied, in my opinion, with the terms of the contract. As long as they didn't get production, there was nothing more they could be in default on.

(Testimony of John Wight.)

Q. Mr. Wight, yesterday we asked you certain questions concerning conversations with representatives of the Fidelity Gas Company and Montana-Dakota Utilities Company at the time the contract, Exhibit 2, which is the deep test agreement, was made, and we asked you certain questions concerning conversations as to what would happen in the event there was a deep [147] test well drilled which was unsuccessful, and we made an offer of proof after our questioning, after the objection to our questioning was sustained. Now, for the purpose, and for the only purpose of explaining the circumstances under which the agreement was signed, and your state of mind at the time, was there a conversation at the time this contract was negotiated and before it was signed as to what would happen in the event the testing program were unsuccessful?

Mr. Lamey: Object to that as incompetent, irrelevant and immaterial, being an attempt to elicit from this witness the same evidence that the Court sustained an objection to, both on the questioning and on the offer of proof, and it is incompetent, irrelevant and immaterial, an attempt to vary the terms of a written instrument, and outside the issues in this case, and, may it please the Court, since yesterday, we have prepared a memorandum on this covering the statutes and decisions of the State of Montana, and we think that there is not the slightest question that this is not admissible. The Court was correct in its ruling yesterday, and we have that available to submit to the Court.

(Testimony of John Wight.)

Mr. Erickson: May I add to the purpose, for the purpose of explaining what seems to us would be a patent ambiguity in the contract between the habendum, which is the "Now, Therefore" clause and Paragraph 4, and of course, we think the cross examination opened this question also. There were other questions [148] asked after the one to which I made objections, and some of the answers were volunteered on the part of Mr. Wight as to the meaning of the contract and the circumstances under which the contract was made, and there was no motion made to strike. It was on cross examination.

Mr. Lamey: I recall of no such evidence, your Honor.

Court: Counsel, I think your offer, and the purpose for which you offer it may still be too broad. The objection of counsel is good. It doesn't appear to me that the Court can receive evidence with reference to the interpretation or explanation of any alleged ambiguity without a proper foundation having been laid by way of pleading, so I will have to sustain the objection.

Mr. Erickson: I would ask the same question then, deleting the latter portion of the purpose.

Court: To explain or interpret the contract?

Mr. Erickson: Yes, and for the further reason that the question would elicit an answer which would be an interpretation of the contract by the adverse party. If the answer is what I would

(Testimony of John Wight.)

anticipate it to be, it would be an admission against interest on the part of the adverse party.

Mr. Lamey: I am in no position to follow that and make objection. I think if counsel has another question in mind, he should state it.

Court: Yes, I don't see that I can rule upon any anticipation [149] that you may have as to what he says. You will have to present the matter in a different light.

Mr Erickson: I have to get by the first question as to whether there was a conversation.

Court: Yes, I think I will be inclined—as I say, the offer you made was too broad, and it included an offer to have the evidence admitted for the purpose of interpreting or explaining an alleged, now you say, an ambiguity of the contract. There is no allegation in the pleadings that there is any ambiguity in the contract, you ask no reformation of the contract or no interpretation of the contract, so the offer of the evidence for that purpose, I would sustain the objection. If you offer it for some other purpose, I will consider it.

(Question read back by reporter.)

Q. What is your answer to that question, Mr. Wight?

A. There was a conversation, yes.

Q. With whom was that conversation held?

A. I think there was Cecil Smith with either Alger Syme or Raymond Hildebrand. I don't remember now whether they were all three there, or just one of them with Cecil Smith.

(Testimony of John Wight.)

Q. How did there happen to be a conversation such as you have mentioned?

Mr. Lamey: May I have the question?

(Question read back by reporter.) [150]

Mr. Lamey: May it please the Court, we object to this entire line of questioning as incompetent, irrelevant and immaterial; it would have no bearing upon the issues in this case, nor could it vary the terms of the agreement which has been admitted into evidence as Exhibit 2, and we think that under Section 93-401-13, that since the agreement was reduced to writing, there being no allegation with reference to mistake or imperfection, the validity of the agreement not being in dispute, that they are foreclosed from going into any conversations in the course of negotiations.

Court: Yes, on that basis I have ruled and continuously ruled I will not receive any evidence to vary the terms of the contract.

Mr. Erickson: We are not offering it for that purpose.

Court: For what purpose are you now offering it?

Mr. Erickson: I am offering it for the same purpose the other testimony is offered, to show the parties' or practical interpretation of the contract under the general rule which permits that in the same section, 93-401 and the various sections there contained.

Court: His own interpretation of it has no bearing on the case at all.

(Testimony of John Wight.)

Mr. Erickson: It is both parties we are dealing with here.

Mr. Lamey: May it please the Court—— [151]

Mr. Erickson: May I—I also call the Court's attention to Section 93-401.17, for the proper construction of an instrument, the circumstances under which it is made, including the situation of the subject of the instrument and of the parties may also be shown so the Judge can be placed in the position of those whose language he is to interpret.

Court: I have indicated already and ruled that you may show the circumstances under which the contract was made, not for the purpose of varying any terms of the contract, but to show the circumstances under which it was made, that there were negotiations. As a matter of fact, the question has been raised as to who made this contract, is it the contract of the defendant and should it be strictly construed against him, and for the Court's information, in order to determine whether or not the contract should be strictly construed against one party or the other, we ought to know how the contract was made. For that purpose, I will permit you to examine with reference to the circumstances surrounding the entering into of the contract.

Mr. Erickson: So the record will be clear, I would state that the purpose of this question and the testimony we had hoped to elicit is that at the time the contract was under negotiation, and in the study of the various provisions, the question came up as to what would happen if the deep test weren't

(Testimony of John Wight.)

successful, and the parties, both sides, said that [152] would be the end of the contract. I don't believe that varies any term of the contract. That was the testimony we had hoped to elicit on this particular question.

Court: You are really then trying to interpret the contract.

Mr. Lamey: Not only interpret it, but put in a provision that is not there.

Court: For that purpose, the objection is sustained.

Mr. Erickson: May I ask one other question along that line just to be sure I have my record made?

Court: Yes.

Q. I have already asked you about paragraph 4 of the agreement, which says if a second test well is not commenced before September 1st of any year, that additional time may be given to April 1st of the following year to commence the additional test wells. You have read that language?

A. Yes, I have.

Q. Was the conversation about which I asked you concerning that paragraph? A. Yes.

Q. Was there a discussion at the time between the parties as to the effect of paragraph 4?

A. Yes.

Mr. Erickson: Your Honor, I hope you will appreciate I am not trying to get around the position stated by the Court. [153]

Court: That is fine, and I might say that later

(Testimony of John Wight.)

when this matter is briefed, if you brief this question, it may be that the Court would have to reopen the matter to receive the evidence if I find your position is correct.

Mr. Lamey: I think there was an offer of proof yesterday in which you stated your position.

Mr. Erickson: I don't believe it completely covered this. I will ask one more question for the purpose of making my record.

Q. What was said by the representatives of the Montana-Dakota Utilities or Fidelity Gas as to the effect of Paragraph 4?

Mr. Lamey: We object to that as incompetent, irrelevant and immaterial, being an attempt, it is an attempt to vary the terms of the written instrument by conversations that took place before the agreement was executed; it is outside the issues of this case; there is no pleading attempting to set up a mistake or imperfection in the agreement, and the validity of the agreement itself is not in dispute.

Court: Sustained.

Mr. Erickson: The offer of proof that has been made heretofore, in the light of this question, is sufficient to raise the whole thing.

Court: As I say, that wouldn't help you on appeal, but so far as I am concerned, you may brief the question when the time comes, and we will give it consideration without reference [154] to any technical failure on the part of the offer of proof, so far as that is concerned, if there is.

Mr. Erickson: With that in mind where it would

(Testimony of John Wight.)

be reviewed in an appellate court, I would now offer to prove through this witness that discussion was had at some length between this witness, Mr. Smith, perhaps Mr. Syme and other representatives of Montana-Dakota Utilities and Fidelity Gas, and in that conversation the representatives of the Montana-Dakota Utilities and Fidelity Gas stated that the language of Paragraph 4 gave to the Fidelity Gas an option to drill further test wells if the first test wells were unsuccessful, and in the event they did not drill additional test wells within the provisions of Paragraph 4, the contract would be totally terminated.

Mr. Lamey: To which offer of proof we object as incompetent, irrelevant and immaterial, no proper foundation has been laid for the reception of such evidence, it is an attempt to vary the terms of a written instrument by conversations that took place between the parties prior to the execution of the agreement; it is outside the issues of this case in that there is no pleading of any mistake or imperfection of this agreement set forth in the pleading, and the validity of the agreement has not been attacked.

Court: Sustained.

Mr. Erickson: In view of the objection that was made by [155] counsel that the conversation occurred prior to the execution of the contract, I want to ask Mr. Wight if there was any similar discussions of Paragraph 4 after the time the contract was executed? A. Yes.

(Testimony of John Wight.)

Q. And with whom was that conversation?

A. That was also with Mr. Heskett, and I think once with Cecil Smith, and I am sure there was once or twice with Mr. Syme.

Mr. Erickson: We make the same offer of proof as to the conversations which occurred after the execution of the contract.

Mr. Lamey: We make the same objection with the addition that this offer of proof attempts to vary the terms of the written instrument by subsequent parol conversation.

Court: Sustained.

Q. Mr. Wight, on the direct examination, I asked you when you first saw the operating agreement, Exhibit 2?

A. Sometime in 1934. It was furnished me about the same time that we had, or I had one of our meetings in Billings here where Mr. Duncan and Mr. Perrigo and Mr. Smith, Mr. Norbeck and Mr. Hildebrand was present.

Q. I thought you testified, Mr. Wight, that Duncan, Perrigo and the others were not present when you discussed the operating agreement. [156]

A. That is correct. That is the first time the contract came to my attention or was handed to me was during that meeting.

Q. Who handed it to you?

A. As I said yesterday, I don't remember for certain whether Cecil Smith or Mr. Syme handed it to me, or whether it had been previously mailed to me, and when they got out here, we discussed it.

(Testimony of John Wight.)

It could have been mailed to me and then discussed after they got here. I did say yesterday, which is true, I have no recollection of ever discussing the Fidelity contract in the presence of the U. S. Geological Survey men, Mr. Duncan and Mr. Perrigo.

Q. But, are you sure that the contract came to you in its present printed form from a representative of Montana-Dakota Utilities or Fidelity Gas?

A. I am, definitely.

Q. Do you know whether the contract, as it now exists is one of the printed originals that was handed to you of Exhibit 2? Can you say whether, so far as the printed material is concerned, it is now the same as it was the first time you ever saw that contract?

A. To the best of my recollection, there was no changes made in this printed contract. I testified yesterday there had been some changes made in the printed unit agreement, but not in this. I did have their verbal promise to drill a second [157] well in Unit 5.

Q. That is not incorporated in here?

A. It is not incorporated in there.

Q. So that the contract, as it now stands, insofar as the printed portions are concerned, is exactly the same as it was when you first handed it or it was mailed to you by some representative of Montana-Dakota Utilities or Fidelity Gas, is that correct?

A. To the best of my recollection, I would say definitely, yes.

Q. As to the material that is typed in the operat-

(Testimony of John Wight.)

ing agreement—in the various operating agreements there are descriptions of property, are there not?

A. That is all, just the description of the property.

Q. And the names of the parties?

A. That's right.

Q. And executions, is that correct?

A. That's right.

Q. Do you recall any conversation with any representatives of Montana-Dakota Utilities or Fidelity Gas in which the manner in which this contract was prepared was discussed?

A. Read that question.

(Question read back by reporter.)

A. No.

Q. You don't recall any conversation as to who, I mean what [158] person actually prepared it?

A. No.

Q. When the contracts which you signed were executed, can you tell us who typed in the descriptions and names of the parties for whom you signed?

A. No, I don't know.

Q. Did you do it? A. No, I didn't.

Q. So, the contracts as you signed them were handed to you or mailed to you by the Montana-Dakota Utilities or Fidelity Gas in the form in which they were finally executed, is that correct?

A. That's right.

Q. With reference to the Exhibit 3, the Unit Agreement, I think you testified that there were

(Testimony of John Wight.)

some changes made in that agreement after it was first presented to you, is that correct?

A. There were quite a few changes made in that one.

Q. Did you yourself draft any of those changes?

A. No, but I was the one that insisted on the changes being made, and some of the changes I insisted upon were adopted.

Q. But you didn't actually write the language that was used in it?

A. No, I didn't write any of it.

Q. Do you know who did make those changes in the unit agreement? [159] A. No.

Q. Were they done in your presence?

A. No.

Q. The meetings as to the unit agreement, as you have testified, were held here in Billings, is that right?

A. Yes. However, we did discuss the unit agreements at one or two meetings in Minneapolis.

Q. When the contract was submitted to you in the final form, the unit agreement, Exhibit 3, was that again delivered to you by somebody from Montana-Dakota Utilities?

A. I believe they were mailed to me, I am not sure, but they were either delivered or mailed to me by someone in the Montana-Dakota Utilities office.

Q. After you received the copies that were executed, subsequently executed, did you make any

(Testimony of John Wight.)

changes by interlineation or otherwise in the contract? A. No, none whatsoever.

Mr. Erickson: That is all.

Mr. Lamey: No further cross examination.

(Witness excused.)

Court: Court will stand in recess until five minutes after 11.

(10-minute recess.) [160]

W. B. HANEY

one of the plaintiffs, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Erickson): Will you please state your name? A. W. B. Haney.

Q. Where do you live, Mr. Haney?

A. Fallbrook, California.

Q. And you are the W. B. Haney who is one of the plaintiffs in the action now before the Court?

A. Yes.

Q. And in the complaint, in causes of action number 11 and 12, you are alleged to be the owner of certain interests in certain leases described in those two causes of action. Have you disposed of those interests since the commencement of this action? A. No.

Q. So whatever interest you had at the time the action was commenced, you still have, is that correct? A. I do.

(Testimony of W. B. Haney.)

Q. Mr. Haney, how early did you begin to acquire any interests in the Cedar Creek field?

A. I believe it was in 1934, 1934 or 1935.

Q. And since that time have you continued to have interests [161] in the Cedar Creek area?

A. How is that?

Q. And since that time have you continued to have interests in the Cedar Creek field? A. Yes.

Q. Mr. Haney, you were not a signer of Exhibit 2, which is the Fidelity agreement, were you?

A. No.

Q. The interests that you have that are under that agreement, you acquired subsequent to the 7th of February, 1935, is that correct? A. Yes.

Q. Now, the properties described in the complaint are in Unit 5 of the Cedar Creek field, are they not? A. I believe so.

Q. And they have produced, insofar as the Judith River sands are concerned, under the unit agreement with the Montana-Dakota Utilities Company, is that correct? A. I think it is.

Q. Now, are you still the owner of the interests in the lands described insofar as the Judith River sands are concerned? Do you still own the Judith River sands in the properties described in Unit 5?

A. No, that is sand—we sold the interest in the top sands, Judith River—I am not familiar particularly with the names of [162] the sands—the upper sands, we sold the gas interest in the upper sands.

Q. To whom did you sell those interests?

(Testimony of W. B. Haney.)

A. Montana-Dakota Utilities.

Q. I hand you a document marked Plaintiffs' Exhibit 24, and will ask you if that is the agreement under which you sold your interests in the Judith sands, the upper sands, to the Montana-Dakota Utilities Company? A. It is.

Mr. Erickson: We now offer Plaintiffs' Exhibit 24.

Mr. Lamey: No objection.

Court: Admitted.

(Plaintiffs' Exhibit 24 admitted in evidence.)

Q. So that by reason of this agreement, you are not in this action claiming any rights as to the Judith River sands, they being the upper sands in the area described in which you claim an interest in the complaint?

A. I have no interest in the upper sands.

Q. Now, after the making of the agreement of the 16th day of June, 1952, which is Plaintiffs' Exhibit 24, who was paying the rentals and royalties on the lands in which you claim an interest in the complaint?

A. I presume the Montana-Dakota Utilities. I am not paying them.

Q. Do you recall that the contract provides they are to pay [163] the leases and rentals?

A. That's right.

Q. Now, this contract bears date the 16th day of June, 1952. With whom was the contract negotiated? A. Do you mean as to selling the sands?

Q. Yes. A. Montana-Dakota Utilities.

(Testimony of W. B. Haney.)

Q. I mean who were the men involved, was it Cecil Smith?

A. Cecil Smith and Mr. Johnson called at my place.

Q. At the time the contract was negotiated, Exhibit 24, was there any discussion between you and Mr. Smith and Mr. Johnson as to the sands other than the Judith River sands?

A. That we still held our interest in the lower sand below the Eagle, what they called the Eagle sand or Eagle River sand.

Q. The top sand is Judith and the second sand is Eagle, is that correct? A. That's right.

Q. Are they both above 2,000 feet?

A. We were to retain all interest below the 2,000 foot, or the Eagle sand.

Q. Were you to retain the Eagle sands?

A. No.

Q. Having in mind that the upper sand is the Judith sands, did you sell anything but the Judith sands? [164]

Mr. Lamey: Counsel, I think the agreement speaks for itself. We will just get confused. I object to this line of testimony.

Court: Yes, I think so.

Mr. Erickson: I am in full agreement.

Q. You have just testified that in the conversation at the time you negotiated this agreement, it was stated to you that the agreement didn't affect your rights in the other sands than those covered in this agreement, is that correct?

(Testimony of W. B. Haney.)

A. That's right.

Q. At the time of this discussion, which was in June, 1952, was any mention made by either Mr. Smith or Mr. Johnson to you of the existence of the Fidelity agreement, which is the agreement here under consideration? A. Not that I recall.

Q. Are you the owner of interests in the Cedar Creek area other than those involved in Unit 5 and in this lawsuit?

A. I have some interest in, I believe what they call Unit 3 of Cedar Creek; I have a small undivided interest.

Q. Is that up in the general vicinity of where Shell has been drilling wells in the last few years?

A. Yes, sir.

Q. Was there any agreement made under which you ratified, as to your interests, the agreement that exists between Shell Oil Company and Montana-Dakota Utilities Company as to that [165] tract?

A. That particular tract, I signed a lease to a Shell representative who called at my place getting the leases on this one particular tract.

Q. Do you know whether that tract was covered by one of these Fidelity agreements?

A. No, I don't.

Q. I hand you Plaintiffs' Exhibit 25, and ask you if that is the agreement which you ratified at the behest of the Shell people? A. It is.

Mr. Erickson: We now offer Plaintiffs' Exhibit 25.

Court: Any objection?

(Testimony of W. B. Haney.)

Mr. Lamey: No objection.

Court: It is admitted.

(Plaintiffs' Exhibit 25 admitted in evidence.)

Mr. Erickson: Counsel are agreeable to stipulating that Plaintiffs' Exhibits 26, 27 and 28 may be admitted.

Court: Very well, they are.

(Plaintiffs' Exhibits 26, 27 and 28 admitted in evidence.)

Mr. Lamey: I think we should add to the stipulation, if you will that those were sent by Cecil W. Smith, Vice-President of Montana-Dakota Utilities Company, and received by the witness W. B. Haney.

Mr. Erickson: May we, in order to avoid putting in the [166] documents for each one, stipulate now that similar letters were sent to H. C. Smith, Susan Wight, International Trust Company and Cedar Creek Oil and Gas?

Mr. Lamey: Yes.

Court: Very well.

Q. These letters, Mr. Haney, are dated, the first one, April 27, 1951, from Cecil W. Smith, telling of the making of the agreement between Montana-Dakota Utilities and the Shell Oil Company, which, I believe, is Exhibit 5; the one of July 23, 1951—no, I am in error there. The first letter, Mr. Haney, of April 27th, tells of Shell's activity in drilling wells, is that correct?

A. I think I received that.

Q. And the second one, I can advise you, Mr.

(Testimony of W. B. Haney.)

Haney, is the one announcing the completion of the operating agreement between Shell and Montana-Dakota Utilities, dated July 23rd, and the one of December 23, 1952, reports on the drilling of wells in the Pine Unit and in the Little Beaver Unit.

Mr. Johnson: May I suggest that the letter of April 27, 1951 also tells of the execution of the operating agreement with Shell?

Mr. Erickson: The record shows that the first letter also tells of the making of the agreement between Shell and M.D.U.

Q. Now, prior to the receipt of these letters, [167] Mr. Haney, from the time you acquired the interests that are described in the complaint and covered by these stipulations, had you ever received any reports or any correspondence of any kind from Montana Dakota Utilities or Fidelity Gas reporting as to the drilling of any test wells to the horizon below 2,000 feet?

A. Not that I can recall.

Q. Did you ever have any communication from them, oral or otherwise, in the period prior to the letter dated April 27th indicating to you that they claimed any interests in the deep sands below the 2,000 foot level?

A. I don't recall talking to them or having any communication whatever.

Q. Is the letter of April 27th the first statement you had from them that they claimed any rights below the 2,000 foot horizon?

(Testimony of W. B. Haney.)

A. So far as I know, it is, to the best of my memory.

Q. Did you know, prior to the receipt of the letter of April 27, 1951, that Fidelity Gas was claiming any rights to the lower sands in the lands covered in the complaint?

A. No. I knew there was an agreement; I took the lands subject to whatever some agreement was. I didn't know what it was. I never saw the copy until the later years.

Q. Had you yourself ever made any attempt to lease or sublet or enter into an operating agreement [168] for the development of the sands below 2,000 feet prior to April, 1951? A. No, I haven't.

Q. Did you have any understanding with John Wight that he was authorized to lease your properties?

A. Yes, I authorized John, told him any time he could get anyone interested to drill it, I would put my land in with what he could get on a deal that would be suitable for him, I thought it would be suitable for me.

Q. You have been down in the Baker field, have you not, on a number of occasions? A. Yes.

Q. And have you been on your properties in Unit 5 on those occasions? A. Yes.

Q. When was the most recent?

A. Oh, I believe 1938, 1938 was the last time I was out there.

Q. And at that time, was there any oil well in existence on any of your lands? A. No.

(Testimony of W. B. Haney.)

Q. And do you know whether there is one now?

A. No, I don't.

Q. Have you ever received any royalty?

A. You are speaking of this now? On Unit 3 Shell has production on Unit 3. You are speaking of Unit 5? [169]

Q. I am speaking of Unit 5.

A. I don't know if there is any on there, I wouldn't know, I haven't been on there for years. I am not getting any checks.

Q. Since the time you made the agreement selling your Judith River sands, have you had any negotiations with any representatives of the Shell Oil Company with relation to your deeper sands in the properties described in the complaint?

A. I don't just get the question. Would you ask that again?

(Question read back by Reporter.)

A. No, I think not.

Q. I believe in your deposition, Mr. Haney, you stated you had some discussion, not with Mr. Coye, but with some Shell representative, in which the matter of gross payments rather than net were discussed?

A. That was in leasing. I told the representative who called on me that I would sign the lease on this small interest up there because it was separate from the other, but I would not sign any lease on the larger holding, other holdings I had, where it was a net proposition, that I wanted gross, I wanted to know what I was getting.

(Testimony of W. B. Haney.)

Q. You were specifically discussing the lands in Unit 5, is that correct? A. Yes.

Q. Did anything come of those negotiations, [170] did you arrive at any agreement? A. No.

Mr. Erickson: That is all.

Cross Examination

Q. (By Mr. Lamey): Mr. Haney, when was the last discussion you just referred to, when Shell talked to you about some small interest you had in another portion of the Cedar Creek Anticline?

A. You have the date on the lease there, at the time we signed that lease you just showed me.

Q. It appears to be January 10, 1953, when you signed this confirmation of deep test operating agreement which has been marked Exhibit 25.

A. If that is the date of the lease, that is the last and only time I discussed it with him.

Q. Have you finished with that?

A. Yes.

Q. If you don't hear me, let me know.

A. I am hard of hearing, and my hearing aid isn't working very good.

Q. Can you hear me all right?

A. Yes, I hear you now.

Q. When you acquired your interests in these lands in Unit 5, did I understand you to say that there was some reference in [171] the documents you received to the Fidelity operating agreement?

A. I took them subject to the agreements that

(Testimony of W. B. Haney.)

had already been signed. I didn't join in signing any agreements I bought the land subject to.

Q. Mr. Haney, do you recall having received a letter dated April 3, 1952, from Cecil W. Smith in which he enclosed a copy of the Fidelity operating agreement? A. No, I don't recall it.

Q. I will get your deposition if you like, but I will just refer this to you, and maybe it will bring it back to your mind. When we took your deposition on April 9, 1953, in Los Angeles, a question was asked, "In addition to those letters, you received a letter of April 3, 1952—" right down there near the bottom, about two-thirds of the way down. Do you find it where I started to read?

A. I don't recall them; I may have received them.

Q. I know you may have forgotten about it. I want to call your attention to this and see if we can straighten it out. I am calling your attention to page 16, a question beginning, "In addition to those letters, you received a letter on April 3, 1952, from Mr. Cecil W. Smith, which enclosed a copy of the Fidelity Operating Agreement, which is called Form 247, did you not? Answer, Yes, that is what I produced, isn't it? Question, Yes, that is a part of the file you brought in now, [172] and Mr. Smith's letter advises you your lands were included in that agreement, did it not? Answer——"

Mr. Erickson: May I stipulate that that occurred?

(Testimony of W. B. Haney.)

Mr. Lamey: Yes, I am trying to be fair to the witness.

Q. "Answer, I don't recall that, Mr. Johnson, it probably did. I received that letter."

A. I brought the letter in with the file.

Q. At that time you brought into the Notary Public before whom the depositions were being taken a file, and in that file was a copy of this Fidelity operating agreement. Do you recall that?

A. Yes, I do now, sir.

Q. As a foundation for your titles to these interests in Unit 5, am I correct in understanding that it is Government leases?

A. The Government leases, yes.

Q. Mr. Haney, I am now showing you Exhibit 19, and I will ask you if that is your signature on the bottom? A. That is my signature.

Q. When Mr. Johnson and Mr. Smith saw you in May, I believe, of 1952, just prior to the time you sold these interests in the upper sands, do you recall that you then discussed the agreement that had been made with Shell to operate under these agreements in the Cedar Creek Anticline?

A. No, I don't recall discussing any agreements that they [173] had made. The only thing I was interested in was the selling.

Q. Do you not recall that a copy was given to you of that operating agreement with Shell at that time?

A. Yes, Mr. Smith left a copy of that agreement with me at that time.

(Testimony of W. B. Haney.)

Q. That was sometime in May, 1952, was it not?

A. Yes.

Mr. Lamey: That is all.

Redirect Examination

Q. (By Mr. Erickson): Mr. Haney, when you testified that you took the properties involved subject to the operating agreement, Exhibit 2, had you seen the operating agreement at the time you made the purchase? A. No, I hadn't.

Q. Did you know whether or not the agreement was in force at the time you purchased?

A. No, I don't.

Q. There is one matter I overlooked on direct. It may not be proper cross examination, but I don't believe counsel will object if I ask Mr. Haney whether there is any other agreement between Mr. Haney and Mr. Wight than the one contained in Defendants' Exhibit 19?

A. That is the only agreement that I have with Mr. Wight. [174]

Mr. Erickson: That is all, Mr. Haney.

Mr. Lamey: That is all.

(Witness excused.)

H. C. SMITH

one of the plaintiffs, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Erickson): Your name is H. C. Smith? A. Right.

(Testimony of H. C. Smith.)

Q. Where do you reside, Mr. Smith?

A. Whittier, Los Angeles County, California.

Q. In what business are you engaged?

A. The manufacture of drilling bits for the production of oil and water.

Q. And you have also some interest in oil and gas leases, is that correct, and potential oil and gas leases?

A. Yes, sir.

Q. How extensive is that?

A. Are you speaking of this property in Montana?

Q. No, I mean generally. It is a background question, Mr. Smith.

A. I own quite a bit of land at different places.

Q. Now, you are one of the plaintiffs in [175] this action, are you not?

A. That's right.

Q. And in the complaint, we have described certain lands in our causes of action 9 and 10, which, by the complaint, you claim to hold an interest in.

A. Yes.

Q. Have you the same interest in those lands now you had at the time the complaint was prepared?

A. Yes.

Q. Did you also enter into an agreement with the Montana-Dakota Utilities Company on the 12th day of June, 1952, under which you sold your interests in the Judith sands in the lands covered by the complaint?

A. I did.

Mr. Erickson: It may be stipulated, I believe, between counsel that Exhibit 29 may be admitted as

(Testimony of H. C. Smith.)

the agreement under which Mr. Smith sold his interest in the Judith sands?

Mr. Lamey: It may be stipulated.

Court: Very well.

(Plaintiffs' Exhibit 29 admitted in evidence.)

Q. So in this action, Mr. Smith, you are claiming no interest in the Judith sands insofar as this property is concerned, is that correct?

A. Correct.

Q. Since the making of the contract, Exhibit 29, who has paid the rentals and royalties on the lands of yours described in [176] the complaint?

A. Since I sold?

Q. Yes.

A. Well, Montana-Dakota Utilities, I understand.

Q. At least, you have not paid them?

A. No, I haven't.

Q. There have been admitted in evidence, Mr. Smith, three letters which were addressed to W. B. Haney, Exhibits 26 and 27 and 28, and it has been stipulated by counsel that you also received similar letters, that is correct, is it not?

A. I would think so.

Q. Signed by Cecil Smith? A. Yes.

Q. Prior to the receipt of those letters, and from the time you acquired the properties described in the complaint, had you ever received any communication from Fidelity Gas Company or Montana-Dakota Utilities Company having to do with the sands below 2,000 feet in your property?

(Testimony of H. C. Smith.)

A. No.

Q. Had you ever had any discussion with any representatives of either company about the lands below, or the sands below 2,000 feet prior to the receipt of the first letter of April 27, 1951?

A. Not that I remember.

Q. Have you received any income by way of [177] royalties from the production of oil from any of the lands covered in this complaint? A. No.

Q. Mr. Smith, I hand you one of the printed copies of Exhibit 2, the operating agreement, and will ask you if you can recall when you first saw such an agreement?

A. Well, I couldn't, I don't remember when I first saw that.

Q. With relation to the time you sold your gas in the Judith sands, or the Judith sands to Montana-Dakota Utilities Company in June of 1952, could you fix any time when might have first seen this operating agreement? Does that refresh your recollection at all?

A. Well, I just don't remember when I seen it.

Q. Now, at the time of the negotiations that resulted in the sale of the Judith River sands, the situation is the same as with W. B. Haney, Mr. Cecil Smith and Mr. Armin Johnson were the representatives of Montana-Dakota Utilities Company, were they not?

A. As I remember, we met at Mr. Haney's home.

Q. So, the discussions were held with you and Mr. Haney and the other two gentlemen present?

(Testimony of H. C. Smith.)

A. Yes.

Q. Was there also a gentleman by the name of Mr. Bewley present?

A. As I remember, I don't believe he was at Mr. Haney's home. [178]

Q. At the time of the negotiations for the sale of the Judith sands, was there any discussion of sands other than the Judith sands?

A. They assured me they would have no interest in any other than the upper gas sands.

Q. When you say "they", do you recall——

A. Cecil Smith and Mr. Johnson, as I remember.

Q. Did you subsequently carry on any negotiations with any representative of Shell Oil Company as to these sands other than the Judith?

A. Yes.

Q. When was that?

A. Well, it was sometime after I sold this interest, this gas interest to them.

Q. With whom were those negotiations carried on?

A. I believe the man's name was Coye, it sounded like that.

Q. How is that spelled?

Mr. Lamey: C-o-y-e.

Q. Do you know who Mr. Coye is?

A. I wouldn't know him if I would see him in the room.

Q. Did you know what his position was?

A. I think he was working with the Shell Company.

(Testimony of H. C. Smith.)

Q. Where did the discussion take place?

A. In my counsel, Mr. Prudohn's office, down in Los Angeles.

Q. What was the discussion? [179]

Mr. Lamey: Counsel, fix the date. This date was when? I didn't hear.

Q. About what was the date of that, can you fix that? You say it was after the time——

A. I would say it was probably 1953 sometime.

Q. It was after you sold the Judith sands, is that correct? A. Correct.

Q. What was that discussion?

A. Well, I know we talked about the fact that I objected to receiving a gross income.

Q. You mean gross or net?

A. I wanted a net income, five percent.

Q. I believe that is gross, is it not?

A. Maybe it is, I don't know whether you call it gross or net.

Q. You wanted a certain percentage of production without any deduction of the costs of operation?

A. Yes, it seemed like the costs of operation, they would eat up all the money I would have, that is, I am thinking now of Montana-Dakota Utilities Company.

Q. Did the negotiations result in any agreement between you and Shell? A. No, they didn't.

Mr. Erickson: That is all. [180]

(Testimony of H. C. Smith.)

Cross Examination

Q. (By Mr. Lamey): It is in the record, but just for the purposes I have now, do you recall whether you acquired some interest from Mr. Haney in these lands about November 20, 1940?

A. Well, I acquired some from Mr. Haney. I don't know the date.

Q. It was quite sometime ago, was it not?

A. Pardon?

Q. It was quite sometime ago, was it not?

A. Yes.

Mr. Erickson: With the permission of counsel, I would like to reopen for the purpose of putting in two more exhibits.

Court: Very well.

Mr. Erickson: May it be stipulated that Plaintiffs' Proposed Exhibit 30, entitled "Cancellation Notice," bearing apparently the signature of Mr. Smith, Mr. Herman Smith, and Plaintiffs' Exhibit 31, which I believe we can agree was signed by Mr. Cecil Smith, a letter, be admitted. I believe counsel has assented to the stipulation, is that correct?

Mr. Lamey: Yes.

Court: Very well, they are admitted.

(Plaintiffs' Exhibits 30 and 31 admitted in evidence.)

Mr. Erickson: That is all I have.

Cross Examination—(Continued)

Q. (By Mr. Lamey): Mr. Smith, I show you what has been marked as Exhibit 30, [181] this no-

(Testimony of H. C. Smith.)

tice of July 16, 1951, I will ask you who prepared that for you, either it or the form from which it was taken?

A. Well, I believe it was John Wight and my attorney, Mr. Prudohn; that is my best remembrance.

Q. I am showing you now Exhibit 18, and I will ask you if that is your signature with John Wight's on the document? A. That is my signature.

Q. You have testified with reference to Exhibit 29, which is the agreement of June 12, 1951, for the sale of certain gas lands that was executed on that date, do you want to see it? A. The sale?

Q. Yes, the sale of the gas lands?

A. I wouldn't say to that, no, I don't think it was consummated on that date, I don't believe, maybe it was.

Q. June 12, 1951, is that correct?

A. That is what this document states here, June the 12th.

Q. Now, there has been introduced in evidence one copy, but at that same time, did you not execute five copies or five agreements altogether covering all of your interests in the Judith gas sands in Unit 5?

A. Well, whatever was necessary to make the sale.

Mr. Erickson: We are willing to stipulate that agreements were executed, on your say-so, five, which resulted in the disposition of the Judith River sands interest in all of the [182] lands de-

(Testimony of H. C. Smith.)

scribed in the complaint of H. C. Smith, or in which he claimed an interest in Unit 5.

Mr. Lamey: And that there may be more than just the one that was introduced in evidence as Exhibit 29?

Mr. Erickson: Yes, with the further understanding, not having seen the other ones, that the others are identical except for the description of the properties and the contracts.

Q. When was the discussion that you referred to with Haney, Armin Johnson and Cecil W. Smith in California?

A. The date of it?

Q. Yes, sir.

A. I don't recall the date.

Q. Was it shortly before this agreement of June 12, 1951, was made, 1952, I am sorry?

A. I don't remember.

Q. Did you have more than one conversation or discussion with Smith and Johnson pertaining to this matter?

A. Well, I think I did with Mr. Johnson. I don't know whether I did with Mr. Smith. That is just as I remember it.

Q. Do you recall a meeting at the office of your attorney, Mr. Prudohn?

A. Yes, I think we met over there.

Q. Who was this Mr. Bewley who you said might have been at the Haney home?

A. I don't think he was there. [183]

Q. Who is that person?

A. He is an attorney there in Whittier.

(Testimony of H. C. Smith.)

Q. At that time, did he represent you in this or other meetings? A. Not that I recall.

Q. Well, now, at one or the other of those conversations, did you not discuss the Shell operating agreement and see a copy that was left with Mr. Haney and you by Cecil W. Smith?

A. No, I think I received a letter from Cecil Smith in regard to the deal he had made with the Shell Company.

Q. And when was that?

A. I think it is in evidence there. It would state on there. I don't remember the date.

Q. You haven't been shown such a letter since you took the stand here, have you?

A. What letter is that?

Q. Well, the one you say you think you received from Cecil Smith with reference to the Shell operating agreement?

A. I thought I looked over the letters that Mr. Haney received there; I thought I looked over the letters Mr. Haney received.

Mr. Erickson: I object to the question as not a proper statement of the evidence.

Court: Counsel introduced some letters addressed to Haney and signed by Smith, and it was [184] stipulated similar letters were sent to H. C. Smith.

Mr. Erickson: I may be in error, your Honor, but I think they are talking about a different letter which was supposed to have accompanied a copy of the agreement. If I am wrong on that, I with-

(Testimony of H. C. Smith.)

draw my objection. I thought they were referring to a different letter.

Mr. Lamey: I am trying to find out from the witness if he did not receive from Cecil Smith at the time of these conferences a copy of the Shell Operating Agreement, dated April 10, 1951.

A. I don't remember that I received it at these conferences, no.

Q. Did you see it at the conferences?

A. I don't even know whether I saw it there or not.

Q. Do you not remember there was considerable discussion about the agreement and the conditions and terms of it.

A. I don't remember that at that time, no.

Q. Now, you say that at least, at these conferences, you were assured that Smith and his company would not claim any interest in the horizons below the Judith, is that correct?

A. Yes, I remember that.

Q. Who told you that?

A. As I understand, it was Mr. Johnson and Mr. Smith.

Q. In other words, at that time, you were only selling your rights in the upper sands? [185]

A. That is correct.

Q. Mr. Smith, to go back to this conversation at the Haney home, and on page 68, near the bottom, after some reference was made to this meeting at the Haney home, the question was asked of you, "You do have some recollection, do you not, that

(Testimony of H. C. Smith.)

there was a discussion about the operating agreement with Shell Oil Company," to which you answered "Yes." Now, did you so testify when your deposition was taken in Los Angeles April 9, 1953?

A. I apparently did, yes.

Q. Does that help you refresh your memory now?

A. I must have thought I had at the time, but I had forgotten anything about it since.

Q. On the next page, 69, at the top, "Question, And that you and Mr. Haney inquired about the development Shell Oil Company was carrying on under that agreement? Answer, I know we had some conversation in regard to it, but as far as the operating agreement, under that, I don't remember it. Question, You recall there was some conversation about the fact you would receive 25 percent of the net profit from the Shell Oil Company operations, do you remember that? Answer, Yes, I do." Did you so testify when your deposition was taken?

A. I apparently did according to this document here.

Court: Well, I think we had better recess, or are you about through? [186]

Mr. Lamey: I am about through, and counsel would like to get this witness through.

Mr. Erickson: We have agreed both Mr. Smith and Mr. Haney could be excused after we have completed with him. It shouldn't take very long.

Q. Mr. Smith, in connection with your statement that you were assured that Mr. Smith's com-

(Testimony of H. C. Smith.)

panies were making no claim to horizons below the Judith River sand, I would like to direct your attention to Paragraph 6 of Exhibit 29, on page 4. Will you read that, please, so you will refresh your mind?

A. I am reading it. Do you want me to read it out loud?

A. No. I call your attention, starting in the second sentence, to the effect, "Nothing in this agreement shall be construed to modify, restrict or impair such rights or the right of an operator authorized thereto pursuant to existing agreements to drill through the Judith River Sand into the deeper formations, but the operator shall case off the gas in said Judith River sand and take all reasonable precautions to protect the Judith River sand from being flooded or otherwise damaged by reason of the operator's drilling operations." Do you recall such provision in this agreement?

A. Yes, but they said they would have no rights to anything below the upper sand when they purchased this, and if some operator did, they would have to protect the gas as they went through. It don't say what operator or who. [187]

Q. When you bought these lands, you bought them subject to the Fidelity operating agreement and unit operating agreement?

A. I didn't buy them subject to that; I didn't know anything about that Fidelity operating agreement.

(Testimony of H. C. Smith.)

Q. Have you recently referred to the documents under which you acquired these interests?

A. I have read over this file of the agreement, if that is what you mean.

Q. Pardon.

A. I have read over this agreement.

Q. No, the agreements under which you acquired your interests, those, for instance, from Harry A. Smith, to refresh your memory as to whether or not those are specifically subject to the Fidelity operating agreement and the gas unit agreement?

Mr. Erickson: To which we object because the instruments are in Court, and are exhibits and speak for themselves.

Court: He is just asking him. He now says he didn't buy it subject to them.

Mr. Erickson: I withdraw the objection.

A. As I recall, I didn't study them over at the time.

Q. Did you have an attorney representing you at the time? A. Not when I bought it.

Court: It doesn't make any difference. Have you got the exhibit, it is in evidence. Is reference made [188] to the Fidelity agreement in the exhibit?

Q. From whom did you receive that Exhibit 29, the agreement to purchase the Judith sands, or to get more specific, did you not receive that from your attorney, Mr. Prudohn?

A. What was that?

Q. The Exhibit 29, which is the agreement to purchase the gas rights in the Judith River sands,

(Testimony of H. C. Smith.)

did you not receive that through your attorney, Mr. Prudohn? A. I don't know.

Q. I say did you not receive that agreement before you signed it through your attorney, Mr. Prudohn? A. I apparently did.

Mr. Lamey: That is all.

Redirect Examination

Q. (By Mr. Erickson): Mr. Smith, reference has been made to the contract, Exhibit 29, the contract under which you sold the Judith River sands, and particular attention was called to Paragraph 6 on page 4. Do you have gas wells in sands other than Judith, having reference to the Eagle sands?

A. I have heard about the Eagle sands, yes.

Q. Do you know whether there is any production from the Eagle sands in your properties?

A. I am not sure. [189]

Q. Subsequent to the making of the contract of June 12, 1952—and I believe the record should be corrected, Mr. Lamey's questions referred always to the date as June, 1951—

Mr. Lamey: You are right, counsel. I looked at another note or agreement as of that date, 1951.

Mr. Erickson: So the correct date is June 12, 1952?

Mr. Lamey: Whenever I made reference to Exhibit 29, it should have been June 12, 1952.

Q. After the date, or about the date of that contract, was there any proposal made to you by

(Testimony of H. C. Smith.)

the Montana-Dakota Utilities Company that the Eagle sands be committed to a unit agreement?

A. Yes, as I remember, there was.

Q. Did you, in response to those negotiations, write a letter to the Montana-Dakota Utilities Company? A. Yes, sir.

Q. I show you a document marked Plaintiffs' Exhibit 32, which is a photostat of a letter dated April 18, 1952, and I may say for your information, Mr. Smith, that that is attached to your deposition in California, and you recall that instrument, do you? A. Yes, sir.

Q. That is a copy of the letter which you sent to the Montana-Dakota Utilities Company, is it not? A. That's right.

Mr. Erickson: We offer Plaintiffs' Exhibit 32.

Mr. Johnson: We object to the introduction in evidence of Plaintiffs' Exhibit 32 for the reason it is incompetent, irrelevant and immaterial, it is relating entirely to the cooperative or unit plan of development with reference to the Eagle sand which was then under consideration, and which is not within any issues of this case. The letter is wholly self-serving, and will not serve to prove or disprove any issue in this case.

Court: What is the purpose?

Mr. Erickson: There are two purposes, one of them is to show, to corroborate what Mr. Smith said as to the statements of Smith and Johnson to the effect they were claiming no interest as operator or otherwise in any sands other than the Judith.

(Testimony of H. C. Smith.)

This would tend to show that sort, or some sort of agreement was sought by them with Mr. Smith, at least as to Smith's lower sands; and also for the purpose of showing the effect of the unit option provision of the contract which is the unit agreement, Exhibit 3.

Mr. Johnson: I can't see where it has any probative effect on any of that.

Court: I don't see how it can affect the interpretation of Exhibit 3. It is the same proposition we have gone through before. It would be Smith's idea as to what the unit agreement provides, but for the other purpose, I will admit it.

Mr. Erickson: That is all I have.

(Plaintiffs' Exhibit 32 admitted.) [191]

Mr. Lamey: No further cross examination.

(Witness excused.)

Mr. Erickson: May it now be stipulated that Mr. H. C. Smith and Mr. W. B. Haney may be excused from further participation as witnesses in this proceeding?

Mr. Lamey: Yes, your Honor.

Court: Very well. Court will stand in recess until two o'clock.

(Noon recess.)

THOMAS A. JIRIK

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Erickson): Will you please state your name? A. Thomas A. Jirik.

Q. Where do you reside, Mr. Jirik?

A. Faribault, Minnesota.

Q. What is your business, Mr. Jirik?

A. Production of oil and natural gas and drilling oil and gas wells.

Q. What, if any, position do you hold with the plaintiff Cedar Creek Oil and Gas Company?

A. President and General Manager. [192]

Q. How long have you held that position?

A. From the inception of the company with the exception of the first 10 months of 1926.

Q. So that after that date, you have continuously been President and General Manager of Cedar Creek Oil and Gas Company, is that correct?

A. Without interruption.

Q. The home offices are at Faribault, Minnesota, of that corporation, is that correct?

A. Yes, sir.

Q. Does it have properties any place but the Cedar Creek Anticline in Montana?

A. They have in Texas and Oklahoma, yes.

Q. For the last several years, where have you put in most of your time in connection with Cedar Creek's operations?

A. Mostly in Oklahoma, and some in Texas.

(Testimony of Thomas A. Jirik.)

Q. Who is actively in charge of the office of your corporation when you are not at Faribault?

A. Mr. Seivers, our Secretary-Treasurer.

Q. Mr. George Seivers, is that right?

A. Yes.

Q. He has charge of the records and files of the corporation, is that true?

A. Yes, sir.

Q. Now, Mr. Jirik, your corporation is one of [193] the plaintiffs in this action, and the properties which you claim in the complaint are described in the first and second causes of action. Has any change taken place in your interest in that property from the date the complaint was filed until today? A. No.

Q. So whatever interest you had when the complaint was filed, you still retain, is that correct?

A. Yes, sir.

Q. How long have you been familiar with the Cedar Creek Anticline? A. Ever since 1928.

Q. Is that when you started, or your company started acquiring interests in that field?

A. That is when we started drilling the first well.

Q. Did your company itself drill wells?

A. Yes, sir.

Q. Where were they?

A. They were right north of Baker.

Q. In the area of the present Unit 5?

A. Yes, sir.

Q. What kind of wells were those?

(Testimony of Thomas A. Jirik.)

A. They were all good wells with the exception of Number 1, which was drilled close to the Carbon Black plant. The second well was drilled on a Government permit about four and a half miles northwest of town. [194]

Q. Those were gas wells?

A. We didn't get anything else up there but gas.

Q. Your wells were drilled to the Judith sands, is that correct? A. Yes, sir.

Q. How many wells did you have drilled in Unit 5 prior to the time of the making of the unit agreement, which is Exhibit 3 in this proceeding?

A. Well, since the agreement of the unit plan—all the wells we had were drilled prior to the making of the agreement on the unit operation of the first gas field.

Q. Do you now recollect how many of them there were? A. Six.

Q. Did you have any part in negotiating the contract which is Exhibit 3 here, the unit plan for Unit 5? A. No.

Q. You signed the contract for the Cedar Creek Oil and Gas Company, did you not?

A. Yes, sir.

Q. You were the one that had any discussions there were in connection with that agreement, is that correct?

A. Yes, discussion was held on the agreement. However, to us it came quite a bit later than it did to some other operators. We were the last ones that were given the agreement to sign so far as I know.

(Testimony of Thomas A. Jirik.)

Q. Can you tell us the circumstances under which the agreement was signed?

A. Well, the agreement, as it was signed, was signed under protest by our Board of Directors.

Q. What do you mean by that?

A. They wasn't satisfied with it, but——

Mr. Lamey: Object to that as incompetent, irrelevant and immaterial. The agreement has been executed, and what transpired on the Board of Directors is hearsay as to the defendants in this case.

Court: Yes, I think the objection is good. I will sustain the objection.

Q. Were there any discussions between you and any representatives of the Montana-Dakota Utilities Company concerning the terms of the agreement, which is Exhibit No. 3, the unit agreement?

A. Yes, mostly with Mr. Smith and Syme, Attorney Syme.

Q. And he is the Alger Syme that has been identified heretofore? A. Yes.

Q. Where did the discussions take place?

A. In the office of Montana-Dakota Utilities Company, Minneapolis.

Q. And was there a discussion at that time of the terms of the agreement? [196]

A. Well, we were frankly told——

Mr. Lamey: Pardon me, I would like to have that answered yes or no.

Court: Yes, answer it yes or no.

A. What was the question?

(Question read back by reporter.)

(Testimony of Thomas A. Jirik.)

Q. Answer that yes or no, Mr. Jirik.

A. Was there a discussion?

Q. Yes. A. Yes.

Q. Who was present when there was a discussion? A. Mr. Smith and Mr. Syme.

Q. That is Cecil Smith that has been identified here? A. Yes, sir.

Q. Do you know about when that discussion took place?

A. Prior—right in January of 1935.

Q. Was there anyone else present beside you three? A. Not in Minneapolis.

Q. Now, what was the discussion or the negotiation that occurred at that time between you three?

A. Well, they were unitizing the field, and we had nothing in the north end, but we did have one piece which we had an interest in in Unit 4, and most of our stuff is in Unit 5, and some in Unit 6, and at the time before the contract was signed, both Mr. Syme and Mr. Smith told me themselves [197] that it is the same contract for everybody in the field.

Q. Did you have then a contract submitted to you by Mr. Smith and Mr. Syme? A. Yes.

Q. And is it the printed contract that is now in existence as to Unit 5? A. Yes.

Q. Defendants' Exhibit 3 is the contract, I believe, which was between your company and the Montana-Dakota Utilities Company?

A. That's right, that was signed by our secretary.

(Testimony of Thomas A. Jirik.)

Q. A little louder.

A. That was signed by myself as President and Robert Basching, our Secretary at that time, and Mr. Heskett, and whose is this name, I don't know.

Q. It is one I have never been able to figure out either. Now, when did you first see this contract, Defendants' Exhibit 3?

A. At Syme's office in Minneapolis.

Q. And under what circumstances did you see it, did he present it to you? A. Yes.

Q. Do you know who prepared it?

A. I believe it was prepared in the office of Montana-Dakota by Mr. Syme, and maybe somebody helped him, I don't know. [198]

Q. You didn't prepare it?

A. No, we didn't prepare it.

Q. Was there a discussion, was there a detailed discussion of the various provisions of the contract prior to the time you signed it?

A. Yes, there was.

Q. Were there any changes made in the contract as a result of those discussions? A. No.

Q. And the contract as it now appears in the form shown in Defendants' Exhibit 3 is the contract you say you signed there, is that correct?

A. That's right, they claimed they had everything ironed out——

Mr. Lamey: Just a minute, I object to that as not responsive, and ask it be stricken.

Mr. Erickson: I believe it is part of the gen-

(Testimony of Thomas A. Jirik.)

eral discussion that took place, and the officers of the corporation are being quoted.

Court: What was the question?

(Question and answer read back by reporter.)

Mr. Lamey: From there on I move it be stricken as not responsive.

Court: Overruled.

Q. Was any statement made to you that others [199] had agreed to this contract?

A. I was told by Cecil Smith everybody agreed to the same thing for everyone. Then I didn't question anything because I knew the N. P. had a lot of land in there, and if it was good for the N. P., it was good for everyone else.

Q. Similar agreements were signed as to other tracts of your land, that is, you signed more than one of these, did you not? A. Yes, sir.

Q. Showing you Defendants' Exhibit 2, which is designated Operating Agreement, it has been variously referred to as the deep test agreement, did you negotiate the making of that contract on behalf of the Cedar Creek Oil and Gas Company?

A. No.

Q. I notice it bears your signature. Can you tell us the circumstances under which the contract was signed?

A. All were signed under the same circumstances.

Q. What does that mean?

A. Well, there was nothing else we could do,

(Testimony of Thomas A. Jirik.)

there was no other market for the gas. In order to sell any gas, that was our only out, the same as anybody else.

Q. I am now referring to the deep test agreement, which bears a date later than the Unit 5 agreement. A. Yes.

Q. Having in mind this is the agreement which [200] covers the testing of the deeper sands, can you tell the circumstances under which that contract was signed, that is, as to any discussion that preceded the signing?

Mr. Lamey: I would like to have the question read; I didn't follow it.

(Question read back by reporter.)

Mr. Lamey: I thought the witness had already answered that.

Mr. Erickson: I believe he was confused as to the contracts.

Court: The objection is overruled. Proceed and answer the question.

A. Well, that was signed with the same objection as the first unit plan.

Q. That isn't quite responsive to my question. When did you first see this agreement?

A. In the office of Montana-Dakota.

Q. And was there *there* present at that time the same two gentlemen you have referred to on the other?

A. The first time there was only Alger Syme. He apprised me of the agreement in the making, and that is where I saw it first.

(Testimony of Thomas A. Jirik.)

Q. Alger Syme told you about the preparation of this agreement before it was actually completed?

A. Yes, sir. [201]

Q. And did he indicate to you who was preparing the agreement? A. No, I never asked him.

Q. When did you first see the agreement, Exhibit 2?

A. Well, that came along, I don't remember the date, but that came along later than the unit plan.

Q. And can you say under what circumstances you first saw the agreement?

A. Well, the same circumstances as I just mentioned.

Q. That would be in the offices of Montana-Dakota Utilities Company?

A. Yes, at the time——

Mr. Lamey: May it please the Court, I object to this repetition, going over and over, the witness has already answered, and I would like to have an opportunity to have the questions so framed that I can object and try to simmer out here what is just conversation before the agreements were executed, and what pertains to circumstances.

Court: Yes. I do think it is not counsel's fault. I think the witness is not answering the question. Pay particular attention to the question that is asked, and then direct your answer specifically to that question. Counsel will think of other questions to ask you.

Q. I am trying to get from you, Mr. Jirik, the situation when you first saw this agreement, where

(Testimony of Thomas A. Jirik.)

[202] you first saw it, and who was present, and the approximate time. Can you tell us that?

A. I cannot tell you the time, but I know it was in Alger Syme's office.

Q. That is where you first saw this agreement?

A. First.

Q. Anyone else present there beside you and Alger Syme? A. No.

Q. What form was the agreement in when you first saw it?

A. Well, it wasn't complete, the time I saw this, but it was quite long, and we were going over some of the paragraphs in here, and he said—there has been some references made——

Mr. Lamey: Object to this as not responsive, reciting conversations that took place before this agreement was executed, incompetent, irrelevant and immaterial.

Court: I have indicated, on a limited basis, that is, not for the purpose of varying the terms of the contract, or anything of that nature, but to show there were discussions, that this line of testimony is admitted. In other words, there is a contract here. With reference to whether this contract must be strictly interpreted as against one party or the other, with reference to that, I think it is important for the Court to know what the circumstances were under which the contract was entered into. I am not going to, and I don't accept the evidence [203] for the purpose of varying the terms of the contract, but for the purposes of showing what the

(Testimony of Thomas A. Jirik.)

circumstances were under which the contract was entered into, I will accept and listen to any conversation that was held with reference to this negotiation.

Mr. Erickson: That is my only purpose, your Honor.

Court: Very well, so proceed.

Mr. Erickson: Can we have the last question, please?

(Question and answer read back by reporter.)

Court: Proceed now.

A. It was incomplete.

Q. And was there a discussion then between you as to revisions that were to be made?

A. No.

Q. Did you make any suggestions to Mr. Syme on changes you wanted? A. No.

Q. Now, thereafter, you saw the completed agreement, is that correct? A. Yes, sir.

Q. Now, I hand you the Exhibit 2, which is a photostat of an executed copy of the agreement, Exhibit 2, and ask you if the agreement was in the form that it now appears, except for the signatures, when you next saw it? A. Yes, sir.

Q. Now, where was that contract signed? [204]

A. Well, our contract was signed in Faribault, Minnesota, on February 11, 1935.

Q. Now, is there any language in that contract which you yourself drafted? A. No.

Q. Was there any language in there drafted by

(Testimony of Thomas A. Jirik.)

somebody on your behalf, by an attorney or agent?

A. No.

Q. Following the making of the agreement, Exhibit 2, what, if anything was done by the Fidelity Gas Company insofar as field operations are concerned, if you know, on your land?

A. Well, the first that they did anything in the way of a deep test was in 1936.

Q. Were you familiar with that yourself by personal observation?

A. Where the well was drilled?

Q. Yes.

A. I saw it, yes, but we was never apprised of the location before it was made or drilled.

Q. Do you know that is the N. P. No. 1?

A. Pardon me, I thought you had referred to the Warren well. The N. P. well, yes, I was there.

Q. That is down in the Little Beaver area?

A. Yes.

Q. That is approximately how far from your lands? [205]

A. About 32 or 34 miles.

Q. You were on the ground there a considerable amount of the time that the N. P. No. 1 well was being drilled, is that true?

A. Yes, sir.

Q. I believe on your deposition, you stated you assisted in the gauging of that N. P. No. 1 well?

A. At the request of Mr. Cecil Smith.

Q. At the time you assisted in gauging of the N. P. No. 1 well, I believe you testified you were aware of the drilling of the Warren well, is that true?

A. Yes, sir.

(Testimony of Thomas A. Jirik.)

Q. You would not be in a position to say whether you had or had not received that letter?

A. I don't think we ever have; I don't remember seeing it.

Q. Now, these letters I have just shown you, and which have been just introduced here, are all letters reporting on the progress of the deep testing, is that true? A. Yes, sir.

Q. As to the letter of November 1, 1937, you have no recollection of having seen that?

A. No.

Q. When did you first learn that the drilling activities in Warren No. 1 had been terminated or had ceased?

A. Sometime shortly, maybe two or three weeks prior to my trip to Baker.

Q. You had heard of that before you went to Baker and observed the well, is that correct?

A. Yes, sir.

Q. And after going to Baker, what, if anything, did you do in connection with that Warren well? A. Nothing.

Q. Now, the Warren well was drilled on one of your leases, is that correct?

A. Yes, on our Government permit.

Q. Subsequent to your trip to Baker, did you make a trip to Minneapolis to discuss any of these [209] matters with officials of Montana-Dakota Utilities or Fidelity Gas Company?

A. Yes, I did.

Q. When was that?

(Testimony of Thomas A. Jirik.)

A. It was prior, maybe two or three weeks prior to my going out there.

Q. You went to their office before you went to Baker, is that correct? A. Yes.

Q. To whose office did you go?

A. Alger Syme's.

Q. At that time, who was present?

A. Just Alger Syme.

Q. And yourself? A. And myself.

Q. Did you have a discussion concerning that Warren well? A. Yes, we did.

Q. What was that discussion?

Mr. Lamey: May it please the Court, we object, no proper foundation has been laid; it is incompetent, irrelevant and immaterial; they are now attempting to relate a conversation with a man who is deceased.

Court: I don't think that because he is deceased makes it incompetent or irrelevant. What is the purpose of the proposed testimony, counsel, with reference to the question of abandonment?

Mr. Erickson: That's right. I believe it is established Mr. Syme was attorney for Montana-Dakota Utilities and Fidelity and participated in drafting these.

Mr. Lamey: The mere fact an attorney drafts a document does not give him a right to speak for a company as an officer or official, and there is no showing he was anything other than an attorney who drafted an agreement here, Exhibit 2.

Mr. Erickson: I believe the record shows he was

(Testimony of Thomas A. Jirik.)

general counsel, but I can examine the witness further.

Mr. Lamey: It doesn't and it wouldn't be a fact.

Court: I think on that basis, as to whether or not he was a person who could bind the defendant, you may need some further foundation.

Q. Who was Alger Syme?

A. Alger Syme was, to my knowledge, the general counsel for Montana-Dakota Utilities, and the next man I knew as attorney was Mr. Hildebrand of Glendive.

Q. Do you know anything of what Mr. Syme's duties were as general counsel for the Montana-Dakota Utilities Company?

Mr. Lamey: We object, it is incompetent, irrelevant and immaterial, and may it please the Court, I would like to cite now to counsel and the Court all of the authorities he has been contending so strongly for in Carpenter against Industrial Gas, all of them.

Court: I don't think this man is in any position [211] to estimate what his duties were or what his authority was. It would seem to me you can get at that problem, but as the record now stands, I don't think the Court is in a position to accept the testimony with reference to the conversation of Mr. Syme because it doesn't appear, so far as I am aware, that he in any way could bind the defendant.

Q. Now, at the time you were in Minneapolis and talked to Mr. Syme, did you have any conver-

(Testimony of Thomas A. Jirik.)

sation with anyone else connected with the Montana-Dakota Utilities Company?

A. I intended to, but as happened many times, Mr. Smith was gone, and so was Mr. Heskett.

Mr. Lamey: Just a minute. I object to this as not responsive.

Mr. Erickson: I believe, your Honor——

Court: I think it is. He asked who else he talked with in the company. He is just explaining who else he talked to; the objection is overruled, proceed.

Q. Subsequent to that visit, did you at a later time return to Minneapolis and have any discussion with anybody connected with the Montana-Dakota Utilities Company concerning this Warren well?

A. Yes.

Q. When was that?

A. In regards to the Warren well, it was late in the fall of 1937. [212]

Q. And with whom did you have a conversation then? A. First with Mr. Heskett.

Q. And Mr. Heskett was then the president of the two companies, is that correct?

A. Yes, sir.

Q. Where did the conversation take place?

A. In his private office.

Q. Was there anyone else there present?

A. No.

Q. Now, will you tell us what the conversation was between you and Mr. Heskett with relation to the Warren well?

(Testimony of Thomas A. Jirik.)

A. Yes, Mr. Heskett told me that they got a dry hole, that they spent too much money, they were criticized by the stockholders and they were all through drilling for deep oil in the Baker field.

Q. Was there anything further said at that time in that conversation?

A. That was about all with Mr. Heskett. He was busy, and I excused myself. He had a number of calls; the telephone was just ringing continuously. I went over to Cecil's office.

Q. Who was Cecil? A. Cecil Smith.

Q. Was that on the same occasion?

A. The same, maybe three or four minutes afterwards.

Q. Who was present at the time you went to Cecil Smith's office? [213]

A. Just Mr. Smith and myself.

Q. Was there a discussion there concerning the Warren well? A. Yes.

Q. What was that discussion?

A. I said, "Mr. Heskett just informed me you folks are not going to do any more in the Baker field." He said, "We are not, we are all through."

Q. Was that was reference to any particular sands, or any particular activity?

A. Drilling for oil, deep wells.

Q. Was that all of the discussion between you and Mr. Smith at that time? A. That is all.

Q. You fix that discussion as sometime in the late fall of 1937. Did you thereafter have any further discussion with either Mr. Heskett or Mr. Smith concerning the Warren well? A. No.

(Testimony of Thomas A. Jirik.)

Q. Did you make any further visits to Mr. Heskett's office in Minneapolis after 1937, alone or in the company with someone else, in which the matter of the Warren well was discussed? A. No.

Q. Did you, sometime after 1937, visit Mr. Heskett's office in the company of George Seivers?

A. No. [214]

Q. Did you visit Mr. Smith's office in the company of—— A. Yes, sir.

Q. When was that?

A. Oh, that was a good long while afterwards, in late, I mean in the summer of 1938.

Q. Have you any way of fixing a closer time than the summer of 1938?

A. I believe May or June.

Q. Now, who was present at that conversation?

A. Just Mr. Smith and myself.

Q. Was George Seivers there?

A. Not the first time.

Q. Well—— A. No, he was not.

Q. Did you have a discussion with Mr. Smith sometime in 1938 concerning the Warren well?

A. No.

Q. Did it have anything to do with the deep drilling in the Cedar Creek Anticline? A. No.

Q. Well, now, did you make a visit to Mr. Smith's office in the company of Mr. Seivers?

A. Yes, sir.

Q. When was that?

A. That was my second visit pertaining to [215]

(Testimony of Thomas A. Jirik.)

drilling wells to the Eagle sand when Mr. Seivers was along with me.

Q. Was there at that time any discussion of drilling for oil? A. Yes, sir.

Q. There was present at that discussion you, Cecil Smith and George Seivers, is that correct?

A. That's right.

Q. Was anyone else there? A. No.

Q. Can you fix the time when that discussion took place?

A. About two months later than when I was there alone.

Q. With relation to the year 1938, what date would that be? A. In July or August.

Q. What was that discussion insofar as it related to drilling for oil?

A. Mr. Seivers was disappointed and asked Mr. Smith, he said he understood they had given up drilling any deep wells, and Cecil Smith said, "We absolutely have, we are not spending any more money, and we have given up drilling, deep drilling in the Baker field."

Q. Was anything further said about the deep drilling? A. That was all.

Q. Except for those conversations which you have related, did you have any more conversations with either Mr. Heskett or Mr. Smith concerning [216] the drilling to the deeper sands.

A. Not with Mr. Heskett, but I did with Mr. Smith.

Q. And when was that?

(Testimony of Thomas A. Jirik.)

A. That was about a year later.

Q. Where did that conversation take place?

A. In his office.

Q. Who was present then?

A. Nobody, excepting him and me.

Q. What was that discussion?

A. That was pertaining to the second sands wells.

Q. Any discussion then as to the sands below 2,000 feet? A. No.

Q. After these discussions, and after the receipt of the letters which we have referred to here, when did you next hear anything from Fidelity Gas Company or Montana-Dakota Utilities Company concerning the sands below 2,000 feet.

A. Well, there wasn't anything on the Cedar Creek Anticline. I did hear about the Shell well at Ritchie.

Q. I mean now with relation to Montana-Dakota Utilities or Fidelity Gas drilling for oil on the Cedar Creek Anticline?

A. We didn't hear any more about the deep oil drilling for about 15 years after that.

Q. Was the next time you had any word from Montana-Dakota Utilities or Shell on the deep testing the receipt of the letter concerning which counsel has stipulated, being Plaintiffs' Exhibit 14, dated April 27, 1951? [217]

A. I don't remember seeing this letter. That is not addressed to us either.

Q. We have stipulated you did receive a copy

(Testimony of Thomas A. Jirik.)

of it, and I am sure you did from the deposition.

A. I believe we might have.

Q. Assuming you had that letter in your file and it came to your attention, do you recall any other communication between the time you last talked to Mr. Smith about the deep sands until you received this letter? A. No.

Q. I now call your attention to Defendants' Exhibit 21, being a letter dated September 12, 1952. I will ask you to examine that letter.

A. Yes, we received this letter.

Q. You seen that letter, did you? A. Yes.

Q. That letter is dated, as I have indicated, September 12, 1952. Is that the first such notice that you sent to Fidelity Gas Company and Montana-Dakota Utilities? A. Yes, sir.

Q. Can you tell us why no similar notice or other notice was sent, was not sent to them prior to 1952?

A. Well, we were satisfied that they had no more claim on anything else except on gas from the first sand.

Q. Why were you satisfied of that? [218]

A. So much time elapsed, and nothing was done.

Q. Is there any relation between your failure to send notice earlier and the conversations you had with Heskett and Smith? A. No.

Q. I believe you misunderstood my question. Will you read the question again?

Mr. Lamey: I don't think so. We object to this as leading and trying to put words and suggestions in the witness' mouth.

(Testimony of Thomas A. Jirik.)

Court: Yes, it is leading. I think you can ask further questions along that line, though, to determine whether or not there is any mistake.

Q. Mr. Jirik, you have testified you didn't send that notice earlier because there had been no action? A. That's right.

Q. Was there any other reason you didn't send it earlier? A. Yes.

Q. What was that?

A. Because I was fully satisfied—it came from the head officers of Montana-Dakota Utilities—that they was out and there was no more use talking about it.

Q. Are you now referring to the conversations you had with Heskett and Smith?

A. It was the last talk on the deep test.

Q. Have you ever received any royalty from the [219] production of oil on your lands in Unit 5?

A. Not from oil.

Q. And what income you have had has been limited to income from gas, is that correct?

A. That's right.

Mr. Erickson: I want to make this one exhibit, your Honor. These are gas statements covering the agreements between Cedar Creek and Montana-Dakota Utilities for the year 1949 to illustrate the manner in which the unit operation is handled and the way in which the royalties are charged, and it could be any year, but I took 1949.

Mr. Johnson: I would like to inquire as to the materiality of this. The cause of action relating to

(Testimony of Thomas A. Jirik.)

the unit plan has been limited entirely to the question of whether the unit plan agreement applies to anything other than the Judith River sands. Those statements counsel is offering are only statements which account for gas production. I can't see where it has any materiality to this case at all.

Mr. Erickson: The purpose of the testimony is not to attack the validity of the Unit 5 agreement, but the answer of defendants alleges they have paid royalties and rentals on these properties, and have expended large sums of money, and they have also alleged at some length the benefits that have accrued to the plaintiffs from their purchases of gas from those sands, and the primary purpose is to [220] show the manner in which the royalties and rents have been paid and to illustrate none of them have been paid by them.

Mr. Lamey: Counsel will recall that answer was filed before you amended your reply and took out the section that pertained to these gas unit agreements, and gas purchase agreements.

Mr. Erickson: I would be happy to stipulate that, but your answer remains. You claim rights under Unit 5.

Mr. Lamey: As to the deep sand agreement, those will illustrate nothing to do with it.

Court: Well, I am going to receive them in evidence and find out what they will illustrate.

Mr. Erickson: I will put them in this folder.

Court: Those are statements that Cedar Creek received from Montana-Dakota?

(Testimony of Thomas A. Jirik.)

Mr. Erickson: Yes, and it is intermingled between 6 and 4, it is their complete operation. There is no way to separate them. They have but one purpose, to show the manner in which royalties are paid.

Court: I should think you could stipulate as to the manner in which royalties are paid. It seems to me it is a pretty simple proposition. Any question about it at all as to how royalties have been paid?

Mr. Johnson: Royalties have not been paid by Fidelity Gas Company. The royalties have been paid out of production. [221]

Mr. Erickson: Counsel wouldn't go yesterday when we tried to stipulate, counsel wouldn't go as far as to say the plaintiffs pay all the royalties. If he is willing to stipulate that they pay them rather than Montana-Dakota, it would be all right. It would be better for the Court to see them.

The Court: The contest between you is whether plaintiffs or defendants pay them?

Mr. Erickson: That's right.

Court: Your position being they are taken out of royalties that would otherwise be payable to the plaintiffs, and in effect are payments of the plaintiffs themselves?

Mr. Erickson: The way the thing works, they buy our gas. Before they pay us for the gas, they take out everything in the way of royalties and annual rents, and because those are spread over a

(Testimony of Thomas A. Jirik.)

year, I thought the year's statements would be necessary to show it.

Mr. Johnson: If the Court please, there is no question but what the royalties have been charged against the properties or the property owners and have been paid out of gas production under the unit plan, and the net remaining amounts have been distributed by Montana-Dakota Utilities to the various lessees or property owners under that agreement, and we make no claim——

Court: Does that satisfy you?

Mr. Erickson: No, I would rather put them in.

Court: Very well, I will receive them. Put them in. [222]

Mr. Johnson: May I ask counsel where in the answer the statement appears to which this evidence applies?

Court: I think it will take more time fighting about that than just putting them in, and let's go. We can look at it later.

Mr. Lamey: Let them go in maybe subject to our objection that they are incompetent, irrelevant and immaterial and illustrate no issue in this case.

Court: When trying a case like this, there is not much sense in wasting too much time arguing about the admissibility or inadmissibility of evidence, because you can make your point in your brief, and if it is well taken, we will exclude that evidence. Proceed.

Q. Mr. Jirik, do you know whether there were

(Testimony of Thomas A. Jirik.)

negotiations between your company and the Montana-Dakota Utilities Company concerning the unitizing of the Eagle sands in Unit 5? A. Yes.

Q. Can you tell about when those negotiations were? If I indicated a letter from Cecil Smith, which I don't care to put in and encumber the record further, dated in February, 1952, is that about the time? A. Yes.

Q. Did those negotiations result in unitizing those Eagle sands? A. No. [223]

Q. Did your company approve the unitization of the Eagle sands? A. No.

Q. You have been selling your gas production from your Eagle sands wells to the Montana-Dakota Utilities Company, have you not? A. Yes, sir.

Q. Can you tell us who paid for those wells? A. We did.

Q. During the years from 1938 on, after you had had your last conversations with Smith, until the present time, have you, on behalf of your company made any attempt to lease these sands below 2,000 feet? A. Yes, we have.

Q. And have you leased them to anyone else?

A. No.

Q. And have you made those attempts more than once? A. Yes, sir.

Q. And how extensively have you tried to lease them?

A. Well, maybe not extensive enough.

Q. That isn't quite responsive, but did you do it more than once, you say?

(Testimony of Thomas A. Jirik.)

A. Oh, yes, about five or six times, different people.

Q. And how long ago did those attempts start?

A. About three years ago. [224]

Mr. Erickson: That is all.

Cross Examination

Q. (By Mr. Lamey): Mr. Jirik, you stated that you have had considerable experience in the oil and gas development work? A. Yes, sir.

Q. Did I understand you to say you are a driller of at least gas wells? Do you have a drilling rig in your company?

A. I have a drilling rig of my own in Oklahoma, yes.

Q. Did you say that the greater portion of your personal operations in the oil business are in Oklahoma or Texas rather than Montana?

A. Since November of 1949.

Q. Now, as to these wells that were drilled, some six, I believe you said, which were drilled in Unit 5 before the unit agreement was set up?

A. No, the second sand wells were drilled afterwards.

Q. Did you drill them?

A. We had Montana-Dakota drill them for our account.

Q. That was on the sands that were not unitized? A. That's right.

Q. Were there some wells drilled on the unitized sands before the unit agreement?

(Testimony of Thomas A. Jirik.)

A. They were all drilled by us on the unit [225] agreement; they were all drilled prior to the making of the unit for the first sand.

Q. When the unit was set up, was there not some adjustment and allowance made for wells that had been drilled?

A. Well, the set-up was made for the whole field, which any unit that had any wells was given credit for the number of wells, and where it had no wells, it was charged.

Q. There was a stipulated price agreed on, was there not, for each well? A. Yes, sir.

Q. For such wells, then, as your company had previously drilled, you received stipulated compensation or price, did you not?

A. That was very little over half cost.

Q. That was what everyone had agreed on, and it was uniform, was it?

A. It was uniform for the field.

Q. When did you start selling your gas to the Montana-Dakota Utilities or Gas Development, or perhaps some other subsidiary or predecessor of M. D. U.?

A. We began to sell the gas prior to the unit agreement.

Q. I understood you to say you had to sign the Fidelity operating agreement and gas unit agreement in order to sell your gas, is that correct?

A. Yes, that was done at the same time all of them were made. [226]

(Testimony of Thomas A. Jirik.)

Q. You had been selling Cedar Creek gas for sometime before, had you not?

A. We first sold to the Carbon Black plant, yes.

Q. I have here an agreement I will be glad to show you, dated May 15, 1929, between Cedar Creek Oil and Gas Company and the Gas Development Company, which is designated "Agreement for Purchase of Gas by Gas Development from Cedar Creek Oil and Gas." Do you recall that? Would you like to see it? A. Yes.

Court: Court will stand in recess until 10 minutes after three.

(10-minute recess.)

Q. Do you recall the agreement now that you have examined it? A. Yes.

Q. Does that not refresh your mind that you were selling gas from at least this Warren land in '29 to Gas Development, one of the M. D. U. predecessor companies?

A. Prior to the signing of the unit plan?

Q. Yes, in 1929.

A. Yes, that is what I said, prior to the agreement for the unit plan.

Q. You had been selling gas?

A. Yes, from the one well.

Q. And later on, as I understand, you or your [227] company executed both the gas unit agreement and the Fidelity operating agreement at about the same time? A. Yes, sir.

Q. Were you on the Cedar Creek Anticline a good many years ago? A. Yes, sir.

(Testimony of Thomas A. Jirik.)

Q. About 1928, I believe you testified?

A. I was there prior to that.

Q. So, you are familiar with that Cedar Creek Anticline for many years? A. Yes, sir.

Q. You know something about U. S. G. S. surveys? A. Yes, sir.

Q. Is that the survey that is reflected on these maps that have been marked here as Exhibit 1 and 1-A? A. Yes, sir.

Q. It is my understanding that you were on there at least part of the time when well N. P. No. 1 was being drilled? A. Yes, sir.

Q. And is it also true you were there during some operation in gauging that well?

A. Yes, sir.

Q. About when was that?

A. I don't remember the date; you probably have that right handy there. [228]

Q. Well, that well was commenced in September, 1935.

A. Yes, and it was in the following summer.

Q. 1936 probably? A. Yes, sir.

Q. And you knew, did you not, about the drilling of the Warren well on land in Unit 5?

A. Yes, that came subsequently, after that.

Q. That's right, I believe that was started in October, 1936? A. Yes, sir.

Q. Did you make frequent trips in there during that period of time?

A. Well, not too frequent, but frequent enough

(Testimony of Thomas A. Jirik.)

to keep posted with it at the time of the N. P. well especially.

Q. Did that same situation prevail with reference to Smith No. 1? A. No.

Q. Were you there during the drilling of that well? A. No, sir.

Q. It is a fact, is it not, that that well was commenced about the same time as the well on the Warren? A. Yes, sir.

Q. But you just never went to the Smith well, is that it? A. No.

Q. Do you recall the drilling of the Carter well, [229] which commenced about May, 1941, down in the southwest quarter of the southeast quarter, Section 19, Township 4 North, Range 62 East?

Mr. Erickson: To which we will object on the grounds it is improper cross examination.

Mr. Lamey: I want to show his familiarity with the development that went on out there.

Court: Yes, for that purpose, go ahead.

Mr. Erickson: The further objection, which I take it will be a continuing objection, is as to the relevancy and materiality and foundation.

Court: Overruled.

Q. As a matter of fact, you were there at one time during the drilling of that well which was being carried on by Carter?

A. No, sir; Carter well? Yes, we made a trip to the Carter well. It was shut down and Perkins' Cementing outfit were pouring a cement pipe. It was dead when I was there; there was no activity.

(Testimony of Thomas A. Jirik.)

Q. About when was that?

A. That was sometime in 1941.

Q. Were you there at any time during the drilling of the well that Husky had charge of?

A. No, for the reason that those wells were too far away from us and I was not interested. [230]

Q. Why were you interested in N. P. No. 1?

A. Everybody in the whole country was.

Q. Why?

A. Because the plan was if that was a success, we might have a big field, that is why.

Q. Wasn't the Husky well in the vicinity of N. P. No. 1?

A. Yes, but we already knew the results of the N. P. well.

Q. You knew what?

A. I already knew the results of the N. P. well.

Q. So, you figured there was no chance of production in the Little Beaver area, is that right?

A. At that particular time I did.

Q. Have you learned since of the discovery of oil by Shell?

A. Yes, absolutely.

Q. So after N. P. No. 1, you had no further interest in any wells that were drilled down in Little Beaver?

A. That's right.

Q. Has the drilling of the well by Shell in Little Beaver created any new interest?

A. I am happy to tell you it is just a completely different picture with the Shell people doing what they are doing.

(Testimony of Thomas A. Jirik.)

Q. It puts an entirely different complexion on the whole Cedar Creek Anticline, doesn't it?

A. Absolutely.

Q. When did you first learn that the agreement [231] had been made with Shell by Fidelity?

A. Oh, that is not so long ago, sometime in 1951, I think it was.

Q. At the time of that letter which has been identified here, I think, dated April 27, 1951?

A. Prior to that.

Q. You learned prior to that? A. Yes.

Q. Through whom did you get your information?

A. From Mr. Austin, one of the Shell land men, in Tulsa.

Q. When was that?

A. Well, that would be—let's see, this is 1955, that must have been about 1950, about 1952, early in 1952.

Q. Well, prior to that, of course, you had seen the letter of April 27, 1951, in which they announced they had made an agreement, had you not?

A. Yes.

Q. And then you didn't learn anything from Austin of the Shell Company until 1952, is that correct?

A. Oh, yes, I did, in between times. The way that came about, Austin was trying to sell me some of the land in Rogers County, and that is how frequent visits was made to the office by myself. Maybe I didn't have the date on those. That is

(Testimony of Thomas A. Jirik.)

where I got the information about the good work you folks was doing on the Ritchie well. [232]

Q. It may help you to refresh your memory if I tell you my information, I think it is correct, is that the Ritchie well came in in July, 1951.

A. Yes, sir.

Q. Would you say it was about that time you talked to Mr. Austin? A. Yes, sir.

Q. Now, did you also learn of the Shell discovery in the Pine Unit in the Cedar Creek Anticline in January, 1952? A. Yes, sir.

Q. And would you also say that helped to put a new complexion on the whole Cedar Creek Anticline possibilities for oil production?

A. Yes, sir, it did.

Q. You testified on direct examination with reference to a notice or letter dated September 29, 1952, from your company to Fidelity Gas Company and Montana-Dakota Utilities Company with reference to cancellation. Do you recall that?

A. Yes, sir.

Q. From whom did you receive that form of notice that was sent out?

A. From John Wight.

Q. And did you send it out in substantially the form he had suggested?

A. Prior to sending it out, I had counsel on it, [233] and then sent it out substantially the same, as it covered the situation about correct.

Q. Now, when was your first visit in Minneapolis with Mr. Heskett or Mr. Smith in which

(Testimony of Thomas A. Jirik.)

you discussed this Warren well, and you received from them some indication that they were not going to do anything more out there?

A. In the fall of 1937, very late in 1937, yes.

Q. Did you make a special trip there for that purpose? A. Yes, sir, I did.

Q. And on that trip, you went alone, as I understand? A. That's right.

Q. You have been questioned concerning a letter dated November 1, 1937, signed by R. M. Heskett to either you or your company. I show you a photostatic copy of a document that appears in the deposition of Cecil W. Smith taken in connection with this case. A. Yes.

Mr. Lamey: Now, we have requested that the original be produced, and, counsel, I would like to know whether you have been able to find that letter?

Mr. Erickson: I don't recall the request.

Mr. Lamey: I take it from the witness' testimony you were not able to find it. In fact, he did not remember such letter, as I recall, so you don't have it, is that right?

Mr. Erickson: Yes. If we have it, we will be glad to produce it. [234]

Q. Calling your attention to the photostat, which I will have marked, I will ask you to read it so you may refresh your memory and tell me whether or not you recall receiving such a letter on or about November 1, 1937?

Mr. Erickson: We will stipulate that letter was

(Testimony of Thomas A. Jirik.)

received by Cedar Creek Oil and Gas at about the time it bears date.

Court: Very well.

Mr. Lamey: I think we had better have that removed and marked.

Mr. Erickson: Can't we agree it is the same as Exhibit—what is that exhibit?

Mr. Richards: That is Exhibit 12.

Mr. Erickson: The plaintiffs are agreeable to stipulating that the letter is the same as Exhibit 12.

Mr. Lamey: Except that letter 12 is signed by Cecil W. Smith, and directed to John Wight, whereas the letter about which the witness is now being questioned is signed by R. M. Heskett, and directed to whom?

Mr. Johnson: Mr. Thomas A. Jirik, Cedar Creek Oil and Gas Company, Faribault, Minnesota.

Court: Very well, it is so stipulated, is it?

Mr. Erickson: Yes.

Q. Now, do you recall that you did see the letter on or about November 1, 1937? [235]

A. It has evidently been in the office. I may not have seen it when it came there because sometimes I am out of the office a month or two at a time, but I will admit the letter came there because there is a photostatic copy of it.

Mr. Lamey: I would like to have Mr. Jirik's deposition made available to him, please.

Clerk of Court: I don't find any deposition.

Mr. Lamey: We don't have one.

Mr. Erickson: We for some reason or other

(Testimony of Thomas A. Jirik.)

seem to have an extra one. This one seems to be an executed copy. We have had it for a month. I don't know how we happen to have it. We may stipulate it should be in the Court's file.

Mr. Johnson: We will let you look at this one.

Court: Well, do you want——

Mr. Lamey: If that is the original, it should be filed.

Mr. Erickson: It is agreeable to the plaintiffs.

Mr. Lamey: It is agreeable to us.

Court: It is not executed by the Notary Public.

Mr. Erickson: Yes, it is.

Mr. Lamey: Let's leave it this way: we will check with the Clerk and if the original is not filed, we will arrange to have this filed.

Mr. Erickson: So far as the plaintiffs are concerned, we are agreeable to stipulating that is a true and correct copy of the deposition as it was [236] taken. I believe it has been signed by Mr. Jirik, but has not been certified by the Notary Public. At the time of taking the depositions, your Honor, it was stipulated between the parties that it could be executed and signed before any Notary Public and without regard to time.

Court: Yes, I see. It apparently was executed before—by Mr. Jirik before a Notary Public for the State of Oklahoma, but there is no certificate, there is no executed certificate by the Notary Public before whom the deposition was taken, but for whatever purpose it serves, it may be admitted.

(Testimony of Thomas A. Jirik.)

You stipulate that is the deposition that was taken, and that he was sworn?

Mr. Lamey: That's right.

Court: Very well, you can file it.

Q. Now, Mr. Jirik, you also testified that you had a second visit to Minneapolis and a conversation with Mr. Smith, I believe, with reference to this same subject sometime after the fall of 1937, is that correct? A. Yes, after that, yes.

Q. Now, was that the time when Mr. Seivers was with you, or was it a later time?

A. The first time I was alone, the second time Seivers was with me.

Q. All right. We have the first time fixed sometime late in 1937? [237] A. Yes.

Q. And now this second date, please?

A. The second date would be sometime, I believe, sometime in February the following year.

Q. 1938?

A. Yes, sir, as near as I can remember, that is about right.

Q. And on that visit, you were alone with Mr. Smith when you discussed this?

A. The second visit?

Q. Yes.

A. No, the second visit was with Mr. Seivers; the first one I was alone.

Q. Then, you say you had another visit at which you discussed the same subject with Mr. Smith, did you not? You had three visits down there on this subject, or two? A. With Cecil Smith?

(Testimony of Thomas A. Jirik.)

Q. There was one with Heskett in the fall of 1937? A. Yes.

Q. Then, you say in February, 1938, Seivers and you discussed this with Cecil Smith, is that correct? A. Yes.

Q. And then did you discuss it with Cecil Smith or Mr. Heskett at any other time?

A. No. The first time was with Mr. Heskett and Smith; the next time was Smith alone. That was [238] on the second sand wells; and the third time Mr. Seivers was alone. On the second sand wells, we tried to get some second sands drilled. That is the time we had it with Mr. Smith alone.

Q. There were only two times, then, that you had discussions pertaining to what you say was the abandonment of the field out there and the deep drilling?

Mr. Erickson: May it please the Court——

Mr. Lamey: Maybe I am dense. I have difficulty in following it.

Mr. Erickson: The question misstates the testimony. Mr. Jirik just said there were three times.

Mr. Lamey: I am trying to get when they visited the third time. I haven't been successful.

Witness: May I repeat?

Q. Yes.

A. The first time with Mr. Heskett and Cecil Smith.

Q. That was in the late fall of 1937?

A. That's right. I was alone. The second time—that was when everything was all off, the drilling

(Testimony of Thomas A. Jirik.)

of any deep wells. The second time I was again alone with Mr. Smith. I was in there pertaining to drilling second sand wells.

Q. All right, when was that?

A. That was prior to the time Mr. Seivers was with me, about two months, almost. Then, Seivers was with me the third time. Do you get it now?

Q. That was in February, 1938, when Seivers was with you?

A. Yes, sir, the end of the month, end of February, 1938.

Q. Now, by late in 1937, your first meeting, would it be as late as November?

A. It was prior to November.

Q. Well, what month then?

A. Either early in November or the last of October; sometime prior to the end of the year anyhow.

Q. Then, would it be correct to say that sometime between that time and the first of the year, you had a meeting with Mr. Smith alone?

A. After the first of the year.

Q. How long after?

A. Oh, probably a week or two.

Q. And that was in Mr. Smith's office in Minneapolis, was it? A. That's right.

Q. Just you and he were there?

A. That's right, we had many of those visits together alone over a period of years.

Q. As a matter of fact, you frequently visited the office up there, did you not?

(Testimony of Thomas A. Jirik.)

A. Yes, most of the time I didn't find those fellows in. They were all over the country.

Q. Most of the time you found them there?

A. Sometimes I did, more times I didn't; that is the truth.

Q. Most of the time you went up there, you visited with Mr. Heskett and Mr. Smith?

A. Mostly Smith and Syme; Heskett was generally unavailable.

Q. You had a good many visits with Mr. Smith?

A. Yes.

Q. With reference to affairs out on Cedar Creek?

A. With reference to the field, and then they got out in the Bowdoin field which they acquired in Shelby at one time. We had leases in Shelby, and we had production over there. Naturally I was interested in what was going on over there.

Q. Now, then, we are correct now, there were only three times in which you ever discussed deep drilling in the Cedar Creek Anticline with either Heskett or Smith. Those are the dates you have now given, late in 1937, sometime after the first of the year in 1938, and again with Seivers about the latter part of February, 1938, is that correct?

A. That is about right.

Q. Now, have you had occasion since coming here preparatory to being a witness to read the deposition, or copy of the deposition, that you gave in Billings on June 11, 1953?

A. Yes, this is it right here.

(Testimony of Thomas A. Jirik.)

Q. Do you recall that in your deposition you testified with reference to a conversation with Mr. Heskett late in 1937? A. Yes, sir. [241]

Q. And do you also recall that you said that shortly after you had seen Mr. Heskett, you saw Mr. Smith and discussed this same subject with him? A. Yes.

Q. Now, is there anywhere in your deposition where you refer to this conversation with Smith early in January, 1938, or the conversation at which Seivers was present late in February, 1938?

A. That is not in the deposition at all.

Q. It is not there at all, is it?

A. No, not to my knowledge; we can check to be sure. I don't think it is.

Q. I have checked, I don't find it and I wondered if you had. A. All right.

Q. Now, I direct your attention to page 30 of your deposition, to the last question that appears on that page. A. Yes.

Q. "Question, As I take it, Mr. Jirik, you have stated the basis for your claim of abandonment which is referred to in the Exhibit No. 3 of the Seivers deposition. Do you have any added ground for your claim that Fidelity abandoned its agreement? Answer, Well, I think I have a very sufficient ground stated from Mr. Heskett, and the reason I believe that Mr. Heskett told me at the [242] time when he told me they were all through, he said, 'On that first well which we drilled which you helped to gauge report got into Minneapolis

(Testimony of Thomas A. Jirik.)

how big it was before we even got back from Baker and we had such adverse comment from our stockholders that it was really serious, that we had no business drilling for oil, that we are a utility company.' And I think that was pretty sufficient ground for me to think they had abandoned whatever rights they might have had. Question, That is the conversation you previously referred to? Answer, In his office. Question, And that took place in 1937? Answer, Yes. Question, But you can't give us the month? Answer, I can't give you the month. I might be able to find a record of it at home; if I can find it, I will give it to you. Question, You have nothing further to add? Answer, Nothing further." Now, at the time and place indicated, did you so testify? A. Yes, sir.

Q. Now, do you recall that Exhibit 3 of the Seivers deposition was the letter of September 29, 1952, from your company to Fidelity Gas Company and Montana-Dakota Utilities Company stating that you claimed they had abandoned and forfeited their agreement, or had abandoned it? I will show you that Exhibit 3, it is in here.

Mr. Erickson: It is an exhibit in the case, too.

Mr. Lamey: Is it in the case?

Mr. Erickson: It is on the Herman Smith [243] testimony, Exhibit 30. I believe it is the same—no, no, it isn't. It isn't the same. I have handed Mr. Jirik the copy.

Mr. Lamey: You have given him this one?

Mr. Erickson: Yes.

(Testimony of Thomas A. Jirik.)

Q. Will you look at Exhibit 3 to the copy of Seivers' deposition which you now have in your hand? Do you see it there?

A. Yes, I already had that here before.

Q. Now, I will ask you if that is not the same exhibit that was referred to in your deposition in the question which was propounded, "As I take it, Mr. Jirik, you have stated the basis of your claim of abandonment which is referred to in the Exhibit 3 to the Seivers deposition. Do you have any added ground for your claim Fidelity abandoned its agreement?" In answer to that question, you gave the answers I have indicated.

A. Yes.

Q. It is a fact, is it not, that this Exhibit 3 in the Seivers deposition was the document to which reference was being made in that portion of your testimony? A. No.

Mr. Erickson: To which we will object because I believe the question is confusing. It is certainly confusing to me, in addition to the fact that the deposition doesn't indicate that state of facts. [244]

Court: Let me see the deposition. What page are you referring to?

Mr. Lamey: Page 30, the bottom of the page.

Court: Now, what is your objection, counsel?

Mr. Erickson: I don't believe the deposition makes any reference to that letter at all.

Court: It refers to Exhibit 3 to the Seivers deposition.

(Testimony of Thomas A. Jirik.)

Mr. Erickson: I will withdraw the objection.

Court: Very well.

Q. Let me put it this way, Mr. Jirik: At the time that question was asked of you, namely, "As I take it, Mr. Jirik, you have stated the basis of your claim of abandonment which is referred to in the Exhibit 3 of the Seivers deposition. Do you have any added ground for your claim that Fidelity abandoned its agreement?" At that time, you were shown this Exhibit 3 of the Seivers deposition, were you not?

A. At the deposition time?

Q. Yes. A. Possibly I was, yes.

Mr. Lamey: No further cross examination.

Court: Any redirect examination?

Mr. Erickson: Yes. In view of the references to the letter of September 9, 1952, which was Exhibit 3 to the Seivers deposition, we have had it marked as Plaintiffs' Proposed Exhibit 37, and now offer it as an exhibit. [245]

Mr. Lamey: No objection.

Court: Admitted.

(Plaintiffs' Exhibit 37 admitted in evidence.)

Redirect Examination

Q. (By Mr. Erickson): Mr. Jirik, in the last questions asked by Mr. Lamey with reference to your deposition at page 30, the question was recited to you, "As I take it, Mr. Jirik, you have stated the basis for your claim of abandonment."

(Testimony of Thomas A. Jirik.)

That language followed your statement as to your conversation with Mr. Heskett, is that true?

A. Yes, sir, sure, that was the basis of it. I wouldn't have said it if I didn't hear it.

Q. Later in the same question, it goes on, "Which is referred to in the Exhibit 3 of the Seivers deposition." Now, is it your testimony now that in determining your claim of abandonment, you had reference to the Heskett conversations, is that true?

A. Yes, sir.

Q. And not solely to what may have been stated in Exhibit 31? A. Right.

Q. Exhibit 37. On cross examination, Mr. Lamey showed you an agreement dated the 15th day of May, 1929, between Cedar Creek Oil and Gas [246] Company and Gas Development Company, which covered the sale of gas, that is correct, is it not?

A. That's right.

Q. On cross examination, Mr. Lamey asked you questions which indicated you were selling gas under that agreement at the time you made the unit agreement? A. Under this agreement?

Q. Yes. A. Not under the unit plan.

Q. But you were selling gas under that 1929 agreement? A. Yes, sir.

Q. Do you know what happened to that agreement? A. Which?

Q. This one of 1929?

A. That was superseded by the unit plan agreement.

Q. At the time you made the unit plan agree-

(Testimony of Thomas A. Jirik.)

ment, was Montana-Dakota Utilities Company or Gas Development Company willing to continue to purchase gas from you under the 1929 agreement?

A. Providing only if the agreement was signed.

Q. What agreement?

A. The Unit agreement.

Q. Who made any statement like that to you?

A. Mr. Smith.

Q. Mr. Cecil Smith?

A. Yes, sir. Further, I was told they were buying no gas from anybody unless it is in the unit plan. [247]

Q. You were told by Mr. Smith unless you signed the unit agreement, they would purchase no more gas from you? A. That's right.

Q. Tell us the same thing a little more slowly?

A. We were scared if we didn't sign it, we couldn't sell no gas and would lose our leases.

Q. Why were you scared?

A. There was no other market.

Q. Did you testify you had a conversation with Mr. Smith in which that was told you?

A. Yes, sir. All those things were prepared. We haven't made any corrections on any of them, any alterations.

Q. I don't know whether the situation is clear. Did you have a conversation with Mr. Smith prior to the signing of the unit agreement as to whether they would continue to buy gas from you if you didn't sign the unit agreement?

(Testimony of Thomas A. Jirik.)

A. That was understood by everybody.

Q. Did you have a conversation with Mr. Smith?

A. Yes.

Q. What was the conversation?

A. The only ones they were going to buy gas from were the ones that got in the unit.

Q. Did he tell you that?

A. Yes. He told that to others, too.

Q. Now, there was a question asked you on cross examination [248] about whether when you signed the unit agreement, you were paid for wells that you had already drilled, referring to the six wells, is that correct? A. That's right.

Q. Do you know who paid you for those wells?

A. I think the check came from Montana-Dakota Utilities.

Q. Do you know who ultimately furnished the money for paying for some interest in your wells?

A. Some of the money was furnished from production on leases that we didn't have no production on.

Q. And, of course, that is covered by the unit agreement, is it not? A. Yes.

Q. Now, you say you visited the Carter well, is that correct? A. One time.

Q. Did you discuss the Carter well with any officials of the Montana-Dakota Utilities Company?

A. No.

Q. Have you seen the contract under which the Carter well was drilled? A. No.

(Testimony of Thomas A. Jirik.)

Q. Do you know the ownership of the land on which the Carter well was drilled?

A. No, I don't know.

Q. What about the Husky well, do you know anything about [249] whose land that was drilled on?

A. I saw that in the paper. I believe it is on some Smith land.

Q. Do you know what Smith?

A. No, there is a number of Smiths over there, I don't know which Smith.

Q. Now, you sent out the notice or sent the letter which is Plaintiffs' Exhibit 37 and Exhibit 29, and I believe you testified on cross examination that the original form of that letter had been received from John Wight, is that correct?

A. That's right.

Q. I believe you also testified you discussed that letter with your attorney, is that correct?

A. First I discussed it with the general counsel of the Independent Petroleum Association of America, and second with Mr. Rehnke of Minneapolis.

Q. It was after discussing it with the attorney of the Independent Producers Association, of which I understand you are a committee member, and so forth, and your counsel, Mr. Rehnke, that this notice was sent out, is that right?

A. That's right.

Mr. Erickson: That is all.

(Testimony of Thomas A. Jirik.)

Recross Examination

Q. (By Mr. Lamey): With further reference to Exhibit 37, I call your attention to the fact that the document in evidence does not bear any signature. We have here the original, and I would like to have you look at it and compare it, and then tell me whether or not you signed that letter for Cedar Creek?

A. Yes, this is the same—let's see. That's right, just as I answered you, I signed that letter.

Q. You signed the original letter that went to Fidelity?

A. I dictated the letter and signed it myself.

Q. You did that after you had had it examined by two attorneys?

A. Yes, sir.

Q. Did you tell them all the facts.

A. Showed them the letter.

Q. Showed them the letter and explained the facts and circumstances you had in mind with reference to Unit 5, did you not?

A. That's right.

Q. You told them of your conversations with Mr. Smith and Mr. Heskett, did you?

A. Yes, sir; may I say this—

Q. Well, I say you did tell them of those conversations?

A. Yes, sir.

Q. Now, I call your attention to the third sentence in the last paragraph, which reads, as follows: "Operations were [251] abandoned, and it was either formally or informally announced at the time that any further efforts to develop the lower

(Testimony of Thomas A. Jirik.)

zones were abandoned.” That appeared in your letter, does it not?

A. In the last paragraph?

Q. Yes. A. Yes.

Q. You say it was either formally or informally announced to you? A. Yes.

Q. You make no statement—or have you ever written any letter to Montana-Dakota Utilities or Fidelity Gas in which you said on these dates they made statements to you that they were abandoning this operation?

A. This is the letter, I thought.

Q. This is the only letter you ever wrote in that regard, isn't it? A. That's right.

Mr. Lamey: That is all.

Mr. Erickson: That is all.

(Witness excused.)

Court: Call the next witness. I think we might take a short recess until 10 minutes after four.

(10-minute recess.) [252]

GEORGE H. SEIVERS

called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Erickson): Will you please state your name? A. George H. Seivers.

Q. Mr. Seivers, I know from past experience you are inclined not to speak quite as loudly as you

(Testimony of George H. Seivers.)

could. Will you make an effort to speak out pretty strongly. Where do you live, Mr. Seivers?

A. Faribault, Minnesota.

Q. Are you connected with Cedar Creek Oil and Gas Company? A. Yes, I am.

Q. What position do you hold with that company? A. Secretary-Treasurer.

Q. How long have you held that position?

A. Since about 1937.

Q. Can you give us an idea of what time of year in 1937?

A. It was our annual meeting during the month of March, either the 8th, 9th, or 10th of March when I was appointed.

Q. In 1937? A. Yes.

Q. So you did not participate in the negotiation of the various contracts that are here in evidence, is that correct? [253] A. None whatsoever.

A. In your position as Secretary-treasurer, you generally have charge of the financial records of the company, is that correct? A. Correct.

Q. And also of correspondence files?

A. Correct.

Q. Now, calling your attention to the Warren well, which is on property included in this complaint, when did you first know of the drilling of the Warren well?

A. It was mentioned in our office through Mr. Jirik in regards to this Warren well that it had been abandoned.

Q. No, I didn't want you to give the conversa-

(Testimony of George H. Seivers.)

tion, but you learned of it when you first became Secretary-Treasurer, is that right?

A. That's right.

Q. Calling your attention to early 1937, did you have occasion to go to Minneapolis with Mr. Jirik?

A. Yes.

Q. When was that?

A. You are wrong. It was shortly before our annual meeting and during the month of March.

Q. My question, I misspoke myself. If I said 1937, I meant 1938, is that correct?

A. Well, I presume I was elected in 1937, but it was in 1938 [254] when I called at the Montana-Dakota Utilities office.

Q. With Mr. Jirik? A. Yes, sir.

Q. And you fix that date as being prior to your annual meeting, is that correct? A. Yes.

Q. Why do you think the trip was made prior to your annual meeting in March, 1938?

A. First of all, I wanted to get some idea of who the people were we were dealing with and have a chance to meet those people and have a conversation so I would have something to base my claims on, or at least in my working capacity, know who I was dealing with.

Q. And was there any other reason why you would fix the time as being before the March meeting of 1938?

A. First of all, there has been a tremendous lot of criticism in the organization because there had been no rents paid for a long time——

(Testimony of George H. Seivers.)

Mr. Lamey: Object to this as incompetent, irrelevant and immaterial, hearsay.

Q. The only thing I was interested in, and I believe Mr. Seivers was coming to that, but it would probably take him too long a route to get there—is there anything about your recollection that makes you think you went up there before the annual meeting? [255]

A. One thing was to find out if there was any possible chance of them drilling any more of the second sand wells.

Q. Maybe I can lead the witness to this extent: Was it your thought that the trip was before the annual meeting because you wanted to make a report to your stockholders in connection with the activities of the company? A. Surely.

Q. Now, who did you see when you went to Minneapolis in company with Mr. Jirik?

A. We talked to Mr. Syme first that Mr. Jirik introduced me to, and also to Mr. Smith.

Q. That is Cecil Smith? A. Yes, sir.

Q. Did you have a conversation with Cecil Smith at that time concerning the oil sands or the deeper sands in your properties in Unit 5?

A. He mentioned——

Q. Did you have a conversation? A. Yes.

Q. Who was present?

A. Mr. Jirik and myself.

Q. The conversation took place in Mr. Cecil Smith's office? A. Yes.

Q. Now, what was the conversation?

(Testimony of George H. Seivers.)

A. First of all he told us they were completely abandoning [256] all the oil business, that there was no more oil as far as they went in the State of Montana.

Q. Did he make—was he making reference to the Cedar Creek Anticline?

A. No—I don't know, I presume that was; if it were, it was in that oil reference.

Q. Did he say anything further about their plans as to the oil operations in Montana?

A. Only that he mentioned that they were abandoning the oil operation.

Q. And that was all the conversation that occurred at that time with Mr. Smith, is that correct, as far as the oil is concerned? A. Yes.

Q. The rest of the conversation dealt with the Eagle sands, is that correct? A. Yes.

Q. Did you have any further conversations with Mr. Smith or any other official of the Montana-Dakota Utilities Company concerning drilling to the deeper sands, the oil sands?

A. The only one was with Mr. Smith.

Mr. Lamey: Before we get off this, I would like—back about the third question, his answer, I didn't quite get it.

(Questions and answers read back by Reporter.)

Q. Mr. Seivers, did you have some correspondence from the [257] Montana-Dakota Utilities Company with relation to a proposal to unitize the Eagle sands? A. We have had letters from them.

(Testimony of George H. Seivers.)

Mr. Lamey: I would like to inquire of counsel what relevance these documents or exhibits have?

Mr. Erickson: May I qualify the witness a step further, then I will point out the relevancy? .

Q. Plaintiffs' Exhibit 38, proposed, is a copy of a letter, apparently on the letterhead of Montana-Dakota Utilities Company, dated January 25, 1952, and bearing the signature of Cecil W. Smith. Plaintiffs' Proposed Exhibit 39 is a document entitled "Geological Report." Now, did you receive the Geological Report, to the best of your recollection, with the letter of January 25, 1952?

A. It must have come at the same time.

Q. It is part of your files, is that correct?

A. That's right.

Mr. Erickson: Before offering the exhibits, counsel has asked as to what we consider the materiality. The materiality of the exhibit is found on page 3 of the proposed Exhibit 39, wherein it is recited, it starts at the paragraph at the bottom of the page, following a discussion of Warren No. 1, and concluding with the last sentence in that paragraph, "Drilling at this well was completed, and the hole temporarily abandoned in January, 1937," and the document has the printed [258] signature of Harry A. Schroth, and accompanied the letter of January 25th, and I offer the two exhibits.

Mr. Lamey: We make no objection except it is incompetent, irrelevant and immaterial.

Court: Admitted, the objection is overruled.

(Testimony of George H. Seivers.)

(Plaintiffs' Exhibits 38 and 39 received in evidence.)

Q. Mr. Seivers, you have heard the testimony in the courtroom as to a series of reports and letters that were written in 1935 and 1936 by the Montana-Dakota Utilities Company to Cedar Creek Oil and Gas concerning the operations in the deeper sands, and you have also heard testimony as to a letter of April, 1951, and succeeding letters, concerning the Shell agreement, that is correct, is it not?

A. That is correct.

Q. Now, you are generally in charge of the office at Fairibault, Minnesota, are you not?

A. Yes.

Q. In the intervening years between the last of the letters in 1937, and the first of the letters in 1951, do you recall receiving any correspondence from the Montana-Dakota Utilities Company or Fidelity Gas Company with relation to any operations or testing or drilling to the oil sands, being the sands below 2,000 feet, on your property?

A. No.

Q. Did you ever receive a report from Montana-Dakota Utilities [259] officials verbally, or Fidelity Gas officials verbally during that intervening period of time covering any such operations?

A. No.

Q. And in preparation for your deposition and for this proceeding, have you searched your files to see whether there is any such correspondence or reports?

(Testimony of George H. Seivers.)

A. I have turned over all reports that were available from Montana-Dakota Utilities Company to Mr. Erickson.

Q. You have testified that you generally were in charge of the office accounts of the company over these years. Did you ever receive any royalty payments for oil from any of your properties in Unit 5, the Cedar Creek Anticline?

A. I didn't quite get that question.

(Question read back by Reporter.)

A. The only payments we have ever received was on the regular deduction sheets.

Q. That was for gas, is that true?

A. That was for gas.

Q. Have you ever gotten any oil royalty payments? A. No.

Mr. Erickson: That is all.

Cross Examination

Q. (By Mr. Lamey): Mr. Seivers, do I understand that it was early in 1937 [260] that you went up to Minneapolis with Mr. Jirik to talk to Mr. Smith and meet the people there?

A. I went in there one time to meet them, but the one trip we actually made in there, I met Mr. Syme at one time and some of the men at the office. I wouldn't say definitely if I met Mr. Smith at that time, but the one main trip I made with Mr. Jirik up to the main office was to find out what the possible chance was that we had of having more of the second sands drilled.

(Testimony of George H. Seivers.)

Q. That, as you say, was in 1937, is that right?

A. As far as the date goes——

Mr. Erickson: As far as the date goes, we object, because the date was not, it was in 1938.

Q. I am sorry, in 1938 it was when you went up on the main trip you refer to?

A. The main date, it would be impossible. I made this trip in particular for one of our meetings to find out more of the possible chance we had of drilling more of the second sand wells. It was the first or second one of those trips.

Q. Mr. Jirik testified you and he went to Minneapolis in the latter part of 1938 and conferred with Mr. Smith, is that about your recollection?

A. Yes.

Q. At that time you were Secretary and Treasurer of the Cedar Creek Company? [261]

A. Yes.

Q. And did you have some obligation to make a report of some kind to the company or stockholders as Secretary and Treasurer?

A. No, but one reason was if you dealt with these men, you knew who you were dealing with. That was one reason Mr. Jirik wanted me to meet the men, to have a knowledge of who these men were that we were dealing with.

Mr. Lamey: May we have Mr. Seivers deposition?

Q. Mr. Seivers, do you recall that your deposition was taken in this case at Minneapolis on May 19, 1953?

(Testimony of George H. Seivers.)

A. The exact date—I know it was taken in the fall of the year.

Q. Actually it was taken in May, according to the deposition, which I will show you, May 19, 1953. The date appears right on the very first page. No, inside, the first page. Now, I will ask you to refer to paragraph 3, or page 3, pardon me, beginning with the second question down, which reads, "Are you in anyway connected with a corporation known as Cedar Creek Oil and Gas Company?" to which you answered, "Yes." Do you find that place?

A. Yes.

Q. Now, at that time and place indicated, did you not testify as follows: "Question, In what capacity? Answer, Secretary and Treasurer. Question, How long have you held that [262] position? Answer, Oh, I would say approximately, it must be at least 10 or 12 years. Question, Since approximately 1940? Answer, I would estimate close to that date. Question, Prior to that time, did you have any connection with that company at all? Answer, Well, I would say it has been about five or six years that I have been Secretary and Treasurer. Before that I was on the Board. Question, That is, since 1940 you have been a member of the Board of Directors? Answer, That's right. Question, And since approximately 1948 you have been Secretary and Treasurer? Answer, Yes." Now, did you so testify at that time?

A. Yes. First of all, when I went in on this testimony, I had no dates, I had no reference what-

(Testimony of George H. Seivers.)

soever as far as the actual time of when I had taken over as Secretary and Treasurer.

Q. Since that time you have checked the records, is that it?

A. Having no reason—I know the dealings of Mr. Jirik, and the time he states when I became Secretary and Treasurer. I had not checked the file, records.

Q. Mr. Jirik has told you when you became——

A. No. As far as that goes, I mean on the actual date of that, I know it was in the fall of the year I made the trip in to see Mr. Smith.

Q. Fall of what year?

A. I cannot definitely state what year that was.

Q. Might it have been 1940?

A. No, it was earlier than that, earlier than 1940. I would be unable to give you a definite date on that.

Q. Then, you are not sure you were there in the latter part of February, 1938, are you?

A. Unless I would have an opportunity to check those records thoroughly.

Q. After your deposition was taken, did you check your records? A. No, I haven't.

Q. And I assume you came out here from Fari-bault, Minnesota to be a witness in this case, did you not? A. Yes.

Q. Did you check your records?

Mr. Erickson: The witness has answered.

Court: Overruled.

Q. Now, Mr. Seivers, I would ask you to turn to

(Testimony of George H. Seivers.)

page 4, at the top of the page, "Question, before 1940, were you connected in any way with the company? Answer, No, outside of being a stockholder."

Did you, at the time and place of your deposition, so testify? A. Yes, according to this here.

Q. You signed it, did you not? You may look at the back. A. That's right.

Q. And it is a fact, Mr. Seivers, is it not, that you had [264] an opportunity to go over that deposition before you signed it? A. Yes.

Q. You did, did you not?

A. Yes. This statement was made in 1938. Those statements should be in the year 1938 when I originally made this.

Q. Now, I would like to have you turn to page 23 of your deposition, and the second paragraph down under Question, which reads as follows: "Question, Well, what I mean, Mr. Seivers, is have you attempted to keep yourself informed as to the operations that Fidelity Gas Company carried on in the search for oil below two thousand feet on the Cedar Creek Anticline commencing in 1935 and continuing up until the present time? Answer, Not during the—not from 1935 until I became a member of the Board. Question, And that was about 1940? Answer, Approximately." Did you so testify?

A. Yes, but as far as all of our dealings were at that time, it was connected mainly with the gas operation, I mean it was just actual gas, and no connection—in fact, on this testimony, I had no knowledge of any oil operations whatsoever.

(Testimony of George H. Seivers.)

Q. At the time your deposition was taken, you had no knowledge of oil?

A. As far as I remember, oil had been abandoned, and there was no oil in the territory.

Q. When did you learn about it after your deposition? Someone [265] told you about these abandonments since your deposition was taken on May 19, 1953?

A. This fact is very confusing to me. When I went in there, I had a girl that was secretary, and the main thing I was watching at that time was our financial statements, and as far as the contracts and those, I never withdrew any of those contracts and examined those records.

Q. Now, I will ask you to refer to page 25, the first part, if you care to read it yourself, you may, but it refers to letters or conversations with Mr. Smith, and down in the middle of the page, I call your attention to the question reading, "As nearly as you can recollect, when did those conversations begin. Answer, Well, I wouldn't want to say 1940 because I would like to check the accuracy of the date when I went into office, but it was since I became Secretary and Treasurer of the Company." Did you so testify at the taking of your deposition? A. Yes.

Q. And then, continuing from there, "Question, Have you had numerous conversations about it? Answer, Yes, we have. Question, And they have been with Mr. Smith? Answer, Yes. Question, They have been here at the Montana-Dakota Utili-

(Testimony of George H. Seivers.)

ties Company office? Answer, That's right. Question, And have they related to the development of gas or the development of oil? Answer, That was related to gas." Did you so testify [266] at your deposition? A. Yes.

Q. Now, calling your attention to page 26, about the middle of the page, beginning with the question, "The conversations did not relate in any way to deep drilling for oil, is that right? Answer, Never had anything because that, as far as I know—we have never had any correspondence in regards to oil out there. Question, Have you had any conversations with regard to oil? Answer, No. Question, Or have you had any conversations with regard to deep drilling, that is drilling below two thousand feet on this property? Answer, Yes. Question, What was that about? Answer, That we would finance, go ahead and have them drill more wells for us and take out of the proceeds to develop, to become a larger producer. Question, Aren't you speaking of the Eagle sand production now? Answer, Yes, because that was mostly contained to the Eagle sand." Did you so testify in your deposition? A. Yes.

Q. And at the bottom of page 27, the last question, "You have had no conversation about drilling below 2,000 feet? Answer, No." Did you so testify at your deposition?

A. Yes, because first of all, there is where I was confused so far the depth went, between the Eagle sand and your Judith River sand. I didn't

(Testimony of George H. Seivers.)

know definitely what depth those wells were drilled at. [267]

Q. I would like to have you refer to page 29, about line 15, to the question, "But, do you know anything about the development for oil, the search for oil, in this area below 2,000 feet? Answer, No." Did you so testify? A. Yes—no, I didn't.

Q. You so testified, did you not, in your deposition? A. Yes.

Q. Now, maybe what you are trying to express is found—I will read you the next question, "You don't know anything about what wells may have been drilled pursuant to the Fidelity gas operating agreement? No. You don't know whether there was one well, two, three, four or five, or how many? Answer, No." Did you so testify at your deposition?

A. Yes.

Mr. Lamey: That is all.

Court: Any redirect?

Mr. Erickson: Yes.

Redirect Examination

Q. (By Mr. Erickson): Mr. Seivers, on the cross examination, reference has been made to the deposition and to statements made in the deposition that you had not discussed oil with anyone insofar as these lands are concerned. Do you recall that testimony? A. Yes. [268]

Q. Now, in view of that testimony, what have you to say as to your testimony today that you did have a discussion with Cecil Smith?

(Testimony of George H. Seivers.)

A. Only that Mr. Smith mentioned to Mr. Jirik as far as oil was concerned, that they had abandoned it.

Q. That was the only discussion of oil there was, is that correct? A. That's right.

Q. But you did have that conversation with Mr. Smith in Mr. Jirik's presence, is that true?

A. That's true.

Q. As to the date when you became Secretary-Treasurer, that date would appear on the records of your company, would it not? A. That is true.

Q. And there is—is there someone in your office in Faribault now?

A. I might be able to contact a man who does the secretarial work for me because of my job, and that I have one party I would have to contact. It is this secretary.

Q. Mr. Seivers, the position of Secretary-Treasurer of Cedar Creek Oil and Gas Company is not a full time job?

A. No, in fact, we haven't drawn any salaries out of it for years; we haven't drawn any salary.

Q. What is your position? [269]

A. I happen to be in charge of sales of the Twin City Seed Company.

Q. That is your regular business? A. Yes.

Q. This job of Secretary-Treasurer of Cedar Creek is an extra job, is that true? A. Yes.

Mr. Erickson: In view of the questions asked of the witness about his deposition, the plaintiffs at

(Testimony of George H. Seivers.)

this time would like to offer the whole deposition as to the original deposition.

Mr. Lamey: I think the proper way to proceed, counsel may question him with reference to anything else in the deposition.

Court: If you object, I will sustain the objection. Counsel only examined him, properly, with reference to his testimony, and you may likewise put in any portions of it.

Mr. Erickson: I am perfectly willing to do that, but counsel will realize that in view of the small part of the deposition put in, I will have no alternative but to go through the whole deposition and ask him if he testified thus and so. I would ask counsel if they are willing to stipulate the whole deposition may be submitted?

Mr. Lamey: I am not objecting particularly about the deposition, but I don't want all of this going in without an [270] additional opportunity to cross examine this witness. Now, if he is going to put something else in, I want the right to cross examine. That is why I am not stipulating to the deposition.

Witness: May I ask a question?

Court: Yes.

Witness: First of all, I have never been on a Court case. When I was asked for the deposition, I had no one to go to, I had no knowledge or anything of the time or what it contained, and Mr. Erickson came in from Montana, and I had no way of checking those records. In fact, as far as secretarial

(Testimony of George H. Seivers.)

work, it could be very easily referred to at the time, I could get information from our office very easily. As far as the date goes, I was truthfully at a loss, because all of our operations we ever handled was always handled on the gas operation. There was no oil ever mentioned, outside of Mr. Jirik mentioned at an early time they had started these wells and they had been abandoned, and then also through Mr. Smith.

Q. Do you have a copy of the deposition? You have a copy, and turn to page 8, the question was asked, "So that now the handling of oil and gas properties is a full time business for Mr. Jirik? Answer, As far as I know." Was that question asked and answered by you at lines 10 and 11?

A. Mr. Jirik has always handled most all of the Cedar Creek business affairs. [271]

Q. Now, just restrict your answer to whether you testified that way, if you will? A. Yes.

Q. Now, line 19 at page 18, "Question, What interests do you claim that Cedar Creek Oil and Gas Company has in properties in Unit 5 in the Cedar Creek Anticline? Answer, You mean the exact, how much acreage, is that what you refer to? Question, I mean the nature of its interests? Answer, Well, outside of being the unit agreement that we signed—— Question, There are two Government leases, one of them is No. 025044-A——"

Mr. Lamey: Pardon me, just a minute. What page is this?

Court: Let me suggest that this is not proper.

(Testimony of George H. Seivers.)

Just because you take a deposition, it is not entitled to be introduced in evidence. You can't introduce it by asking was this question asked you and did you make this answer. You are not entitled to put it in.

Mr. Erickson: I am not going to do it to the extent the Court suggests, but there were questions asked of this witness, we believe, out of context, and in order to show the context in which the answers were given, it is necessary to establish the background under which the answer was given.

Court: The answers on which he cross examined?

Mr. Lamey: I didn't have the page. I was over on 19. I agree that anything that pertains to a question I asked, explains it, he is entitled to go into the deposition, if there [272] is an explanation.

Court: Confine it to that. It doesn't appear to me from your question that it related to the point Mr. Lamey cross examined him about.

Mr. Erickson: The point of examination on this particular portion, before I come to 19, is to show the witness, when asked the questions was confused as to which agreement was being inquired about, and which sands were being inquired about. That was the purpose of putting in this testimony.

Court: If it appears in the deposition that he says he was confused, why fine, put it in.

Q. The last of the question was, "Cedar Creek claims an interest in each of those properties, does it not? Answer, I would like—as far as the numbering and that, I would almost have to check those

(Testimony of George H. Seivers.)

records." Was that your testimony on the depositions?

A. Is that referring to the two top leases you had just mentioned?

Q. Yes. A. Yes.

Court: Counsel, I might suggest that the witness has already explained that, he has said here on the stand that he doesn't know whether he was Secretary-Treasurer in 1938 or 1939. You see, it is the date he can't fix. He is confused on the date, he has already said that. [273]

Mr. Erickson: This is for the purpose of determining what he meant by his statement that there had been no discussion about oil. It is directed to that rather than the time he became Secretary-Treasurer. Those are the questions I had in mind.

Court: He said on the stand here there were no discussions of oil, didn't he?

Mr. Erickson: Yes.

Court: You are not going to impeach him by showing that in the deposition he said there were discussions of oil, are you?

Mr. Erickson: He said on the stand here, both on direct and cross examination there was a discussion of oil to the extent of the conversation he had with Mr. Smith.

Court: Yes.

Mr. Erickson: And the purpose of this was to show there was additional testimony.

Court: It is improper. What are you trying to do, impeach him?

(Testimony of George H. Seivers.)

Mr. Erickson: I am trying to explain his answers to the questions.

Court: He is right here, he can explain them. I think we are just going too far afield. You can read every question and answer in the deposition if we proceed this way. The deposition is not entitled to be produced in evidence just because [274] it is a deposition. Only under particular circumstances may a deposition be introduced.

Mr. Erickson: May I have just a minute, your Honor, to see if there is something here that—

Q. At the time the deposition was taken, Mr. Seivers, can you say whether or not you were familiar with the various agreements that have been put in here, being Exhibits 2, 3 and 4, the operating agreement, the unit agreement, and the gas purchase agreement? A. No.

Q. And since the time of your deposition, have you had an opportunity to examine those contracts and familiarize yourself with them to a greater extent?

A. I mean between the deep sands and those other sands, yes.

Q. Can you say whether or not at the time of the deposition when questions were asked of you concerning the deep sands you had in mind the Eagle sands rather than sands below 2,000 feet.

Mr. Lamey: We object to that as leading.

Court: Sustained.

Q. Do you now know the various sands existing

(Testimony of George H. Seivers.)

in the Cedar Creek field with relation to the various depths involved?

A. Yes, I know they are above 2,000 feet.

Q. When you say "they", which sands do you have reference to? [275]

A. The Eagle sands are above 2,000 feet.

Q. When in the deposition you referred to discussions concerning oil, can you say whether or not you had in mind sands below 2,000 feet, or above?

A. I would naturally believe it would be below 2,000 feet if they were going in for oil.

Q. Were there any discussions concerning sands below 2,000 feet other than the conversation you related here with Mr. Smith?

Mr. Lamey: May it please the Court, we object as being incompetent, irrelevant and immaterial. The question doesn't indicate with whom.

Q. With Mr. Smith?

Mr. Lamey: When or where?

Court: He has amended his question by reference to Mr. Smith, any conversations with Mr. Smith. The objection is overruled. You may answer.

A. First of all, the question from Mr. Smith was that he brought up——

Court: Just answer the question.

Q. Were there any other conversations with Mr. Smith concerning sands below 2,000 feet?

A. No.

Q. That was the only conversation?

A. Yes. [276]

Q. Mr. Seivers, you have testified that the rec-

(Testimony of George H. Seivers.)

ords of Cedar Creek Oil and Gas Company will show the actual date on which you became Secretary-Treasurer, is that true? A. Yes.

Mr. Erickson: In the light of the testimony now, and the statement now of Mr. Seivers, that is all, except I would ask permission of the Court to recall Mr. Seivers on that particular point before the end of the trial.

Court: Very well. Any further cross examination?

Mr. Lamey: No further cross examination.

(Witness excused.)

Mr. Erickson: Those are all the witnesses that the plaintiffs have.

Court: Good. I was just going to inquire about that situation. What does it look like on the defendants' side. How much longer are we going to be working?

Mr. Lamey: About two days.

Court: Well, we will be working Saturday then.

Mr. Lamey: All right, it is so understood.

Court: Fine.

Mr. Lamey: We are perfectly willing to go ahead. We have witnesses here. It might not take that long.

Mr. Erickson: In the other matter, the Carpenter matter, we haven't had an opportunity to go into that matter. We will go into it this evening and make a statement to the Court tomorrow [277] morning.

Court: Court will stand in recess until ten o'clock tomorrow morning.

(Whereupon, a recess was taken until 10:00 o'clock, A.M. the following day, April 15, 1955, at which time the following proceedings were had:)

Mr. Lamey: May it please the Court, we will, if the Court thinks it might help at all, make a brief opening statement to give the Court and counsel a better idea of the evidence we will introduce.

Court: Very well.

Mr. Lamey: I would like Mr. Armin Johnson to make this statement.

Court: Very well.

Mr. Johnson: If it please the Court, our statement will not be directed to any discussion of our legal theories, but only outline briefly the evidence we propose to introduce.

We propose to show that the Fidelity operating agreement, the unit agreement, and the gas purchase agreements, which are exhibits 2, 3, and 4 here, were entered into as part of one deal or transaction, and that similar agreements were entered into with interested property owners up and down the structure in the various units, 1 to 8, as shown on the map; that the purpose of the Fidelity operating agreement was to bring together under common control the properties on the Cedar Creek Anticline, so that Fidelity, or some other operator acting [278] on its behalf and under the terms of the Fidelity operating agreement could undertake a program for the cooperative prospecting and devel-

opment of the Cedar Creek Anticline for oil, having in mind the high cost of deep drilling.

We propose to show at that time it was the opinion of the geologists that the Cedar Creek Anticline was a single geological structure, and that same conception continues right down to the present time.

We propose to show that following the execution of the Fidelity operating agreement, Fidelity and Montana-Dakota commenced a program under which a geophysical survey of the Cedar Creek Anticline was made and preliminary well locations were determined. In 1935 the drilling of the first test well was commenced, and from that time on, Fidelity has been continuously engaged in a program of activity which either through its own employees or agents, or through some other oil company with which it entered into agreement to carry on exploratory work under the terms of the Fidelity operating agreement; this work of exploration and development has gone forward. We propose to show that Fidelity itself, in furtherance of this program, drilled three wells in the period from 1935 to 1938, that it spent upwards of half a million dollars in doing so; that commencing during that same period of time, and continuing through into 1939, it was negotiating with the California Company, and induced the California Company to make a geophysical [279] survey of part of the Anticline in 1938, and, as I say, also negotiated with the California Company to induce it to take on the full development of the Anticline.

We propose to show that in furtherance of its program, Fidelity caused Carter Oil Company to explore the area and drill a test well in 1941, in 1942, under the terms of the Fidelity operating agreement.

During the war years, shortages caused a curtailment of the development program, but immediately following the war, Fidelity carried on negotiations with the Texas Company, J. L. Manning, and Husky Refining Company, which resulted in inducing Husky to come in and drill a well in 1949, acting under the terms of the Fidelity agreement.

Commencing in 1950, Fidelity and Montana-Dakota sought to interest Shell Oil Company in undertaking the exploration and development of the Cedar Creek Anticline under the terms of the Fidelity operating agreement, and by reason of the fact that Fidelity had under contract most of the unitized area of the Cedar Creek Anticline, they succeeded in making a contract with Shell on April 10, 1951, under which Shell agreed to assume the obligations of Fidelity under the Fidelity operating agreement and commenced a program under which the entire Cedar Creek Anticline, including Unit 5 and all the other units have benefited and will continue to benefit.

Although we contend that this evidence will show there [280] has been no default at any time, we propose to show that no notice of default pursuant to the terms of Paragraph 2 of the Fidelity operating agreement has ever been given to Fidelity. We pro-

pose to show through the evidence I have already referred to, and other specific evidence which we will introduce directed to alleged conversations, that no abandonment has taken place, that there has been no intent to abandon, and there has been no act of abandonment by or on behalf of Fidelity at any time. We propose to show that substantial expenditures have been made by and on behalf of Fidelity and Shell, in reliance on the continued existence of the Fidelity operating agreement, and those expenditures have been made during a period when the plaintiffs knew of such activities and failed to assert any invalidity or any termination of the Fidelity operating agreement, and by reason of such, the plaintiffs are now estopped to claim the agreement is not in force, and also by reason of such they have been guilty of laches.

We intend to show that the plaintiffs have failed to attack the Fidelity operating agreement until the time when, through the efforts of Fidelity and Shell, acting under the Fidelity operating agreements, the lands of the plaintiffs have been tremendously enhanced in value.

Now, because of the commitments of some of our witnesses, it will be necessary in some cases to present our testimony out of chronological sequence, but their testimony, when presented, [281] will all be a part of this pattern.

FRANK W. DE WOLF

called as a witness on behalf of the defendants,
being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Lamey): Will you please state
your name? A. Frank W. De Wolf.

Q. Where do you reside?

A. Urbana, Illinois.

Q. How long have you lived there?

A. Since 1907, with the exception of nine years
when I was living in Texas.

Q. What is your profession?

A. I am a geologist.

Q. Will you give us your educational back-
ground in geology?

Mr. Erickson: We are willing to stipulate as to
the qualification of the witness as a geologist.

Q. I think briefly, if you could, despite the stip-
ulation, for which I thank counsel, if you will give
us just a brief sketch of your educational back-
ground in geology?

A. I was a graduate of the University of Chi-
cago, specializing in Geology in 1903. I continued
graduate work there, and then entered the United
States Geological Survey as a Geologist [282] Aid,
Assistant Geologist.

Q. What degree did you obtain from the Uni-
versity of Chicago?

A. B.S., Bachelor of Science.

Q. Do you have any other degree in Geology?

(Testimony of Frank W. De Wolf.)

A. I have the equivalent of a Master's Degree, but no title.

Q. What has been your professional experience as a Geologist?

A. I was three years with the United States Geological Survey, part of it in the Pennsylvania oil fields, part of it in the Illinois oil fields; then I became Assistant Director, and later Director of the Illinois Geological Survey, which position I occupied from approximately 1911 to 1923. I then went to Texas as Chief Geologist with an oil company, and had experience in the management of an oil company in Louisiana; then I returned to the University of Illinois as head of the Geology Department in 1931, and continued in that position until 1946, when I retired.

Q. And what is your status now?

A. I am a Consulting Geologist, but not very active.

Q. During the time you were head of the Geologic Department at the University of Illinois, did you do consulting work and other work in geology?

A. I did a limited amount of consulting work outside of the State of Illinois, and mostly in the summer vacation period.

Q. In about 1934, were you called upon by Cecil W. Smith, of [283] what was then the Minnesota Power Company, a predecessor of Montana-Dakota Utilities Company, to do some work and prepare a report in connection with the Cedar Creek Anticline in Eastern Montana?

(Testimony of Frank W. De Wolf.)

A. Yes, I was asked to advise the Company as to whether deep drilling for oil on that anticline would be justified, and whether a location for a successful well could be made on present knowledge, or whether a geophysical survey should be undertaken, and if so, to what extent.

Q. Had you previous experience in geological work in Montana?

A. Yes, in 1919, I had done work in Central Montana for several months.

Q. And now, in carrying out the undertaking for Mr. Smith and his Company, will you tell us what you did in connection with the Cedar Creek Anticline up to the time you made a first report?

A. My first report to Mr. Smith's company was based on a study of Rocky Mountain fields and characteristics of the structures and sands. This anticline was a peculiar one, having one very steep side and one very gentle side. A study of similar anticlines lead to certain conclusions, and in my report, I analyzed these things and advised geophysical work to solve some of the problems, for example, such asymmetrical anticlines very commonly are different at great depths from what they are in the shallow depths. [284]

Q. At this point, tell us briefly as you can what your definition of anticline is? What do you mean when you refer to an anticline?

A. Yes. These rocks, well, the rocks are laid down originally flat in the sea, and if compressed from the sides or uplifted from beneath, they may

(Testimony of Frank W. De Wolf.)

fold up into a series of folds, some up and some down. The up-folds we call anticlines, and the down-folds, synclines. If the anticlines are very steep on one side and gentle on the other, as Cedar Creek is, then the axis which comes down and divides the anticline may not be in the same position in the deep beds as in the shallow beds, and in locating a well, you want to be on the side of the axis that has favorable gathering ground conditions. You must make allowances for the possible movement of the axis in the structure in the deep lying beds. Therefore, a well like the Absarokee, although it was located on top of this structure at the gas field level, might have been far away from the crest of the anticline down at the depth of the Dakota sandstone.

Q. To what well are you referring when you mention the Absarokee well?

A. It is one of which I have a location, and which I know the location.

Q. Was that drilled on the Cedar Creek Anticline? A. Yes. [285]

Q. By—

A. Northern Pacific interests, I think.

Q. Was that drilled prior to the time you made your report of which you are now speaking?

A. Yes.

Q. I think perhaps we had better put a question to you now. You stated in your report you recommended that geophysical work be done on the structure, did you not? A. Yes.

(Testimony of Frank W. De Wolf.)

Q. What sort of work is that? Will you describe what you mean by geophysical work?

A. I mean specifically the kind of work which is called seismology or seismographic work, with which I was familiar from my residence in Texas. It is a process by which shocks are induced by dynamite in a hole in the ground, and waves of force go out in all directions, some of which go down and bounce back to a detecting instrument, so that the elapsed time is determined very, very accurately. Based on that, the depth of a bed from which the reflection occurs is calculated by these operators, and if you can start at a well with a good log as an aid, you can interpret the undersurface reflections. The echoes that come back from certain hard beds, for example, if I may continue just one minute, by setting up and beginning that work near the Absarokee well, which was drilled to the Dakota sandstone, one could tie the principal echo into a depth of 3900 feet at that place, if that was the depth, and so, by [286] making a series of cross sections with these instruments, one could determine the under-surface shape of this anticline, whether it was like the surface shape or different, and whether the axis had moved in the deeper beds from the shallow beds.

Q. At that time, did you have available the U.S.G.S. maps similar to those that are on the wall here as Exhibit 1 and 1-A, I believe, minus, of course, all of the lines and well locations and so forth?

(Testimony of Frank W. De Wolf.)

A. May I show you an identical map?

Q. It is an identical map that you made use of, is that right?

A. Yes, as a base on which to plan this geophysical work, and if it is relevant, I could show you the equivalent of that map with certain red lines on it showing where these cross sections were made by the geophysicists throughout a length of 40 miles on this anticline.

Q. Do I understand then, the red lines indicate what?

Mr. Erickson: To which we will object on the grounds of relevancy, your Honor.

Mr. Lamey: It is merely illustrating his testimony.

Court: Yes, I think it is admissible, but you had better put the map in evidence if you want to use it.

Q. Did you make use of your U.S.G.S. maps of the Cedar Creek Anticline in preparing your report and in recommending further [287] geophysical work?

A. Yes, it was very important.

Q. What is reflected upon the U.S.G.S. maps generally?

A. There is shown to be an anticline, steep on the west and bordered by a narrow syncline on the west; on the east, a long broad, gently sloping anticlinal limb or side up which oil might migrate readily from a great big gathering ground, which to my mind gave a preference to a location on the east side of the axis rather than the west side.

(Testimony of Frank W. De Wolf.)

Q. Does the U.S.G.S. map have continual lines and elevations shown thereon?

A. It does, and these elevations, these contour lines, which you might regard as lines of equal level, level lines, are shown on these maps close together on the west side, and far apart on the east side, and also, you would notice, if you looked at it closely, a series of little circular or oblong areas along the backbone of this fold, which we call crossed areas, minor domes. They are shown on this map, but they are not very strong, they are mild forms.

Q. Now, do I understand, then, that the purpose of recommending geophysical work was to help you ascertain whether minor domes became stronger at depth?

A. That was one of the purposes; very often that is true.

Q. The other was what?

A. The other was as to whether the axis itself would be [288] found east or further west in the deep lying beds which might be drilled to, whether the axis did migrate.

Q. Did you receive a geophysical report and have access to the results of that work?

A. Yes, a geophysical report was submitted and progress reports were submitted, and there was a lot of telephoning as this work went on.

Q. Who did that work?

A. It was done by the Colorado Geophysical Company.

Q. What have you to say as to whether geophys-

(Testimony of Frank W. De Wolf.)

ical work was somewhat new, at least in the Rocky Mountain area at that time? A. It was.

Mr. Erickson: I wonder if Mr. Lamey would ask him the times of the geophysical survey. I don't believe it is in the record.

A. It would have been in the spring of 1935, I believe.

Q. What have you to say as to whether geophysical work was new in the Rocky Mountain area at the time this was done in 1935?

A. Yes. It had been introduced in the Gulf Coast area about 10 years earlier, but in a different form, a different sort of geophysical work, if I may use the word, it was called refraction work instead of reflection work. This Colorado Geophysical Company was a subsidiary of the Texas [289] Geophysical Company, and opened up an office in Denver. I believe the work was just beginning in the Rocky Mountain region.

Q. Did you correlate the report on the geophysics with what you had found shown on the survey maps, and from other investigation, such as the log of the Absarokee well?

A. We found, if I may give you the conclusion briefly, the geophysics indicated that the structure was very much the same at a great depth, a depth of 8,000 feet, as it was up in the shallow beds, that the axis had not migrated very far, perhaps a little to the east, but not very far. The little domes along the backbone were evident in the geophysical maps, but not greatly different, no great increase in their

(Testimony of Frank W. De Wolf.)

magnitude with depth, Such faults, little breaks, as that map shows were especially studied to see whether they might become bigger at depth, more important in the interfering with oil circulation and migration. The geophysical work did not show much change in those forms.

Q. From that, what did you conclude with reference to the structure, that is, the Cedar Creek Anticline, so far as migration of oil was concerned?

A. We concluded it was essentially one structure——

Mr. Erickson: At this point I want to object and move to strike the answer because it appears there was a written report which contains these conclusions, which would be the [290] best evidence.

Mr. Lamey: We have a report in 1935 before the geophysical work. We have that available, Mr. Erickson, and would be glad to make it available to you.

Mr. Erickson: May I inquire of counsel as to whether the testimony of the witness now relates to the activities in 1935 before the geophysical work was completed, or to a later date?

Mr. Lamey: This relates to his findings after the geophysical work and after his report that he made. He made one written report in January, 1935, recommending geophysical work. The geophysical work was done, and then there was no written report. There were telephone calls, now and then a letter, something like that, but no other written report.

Mr. Erickson: Could you fix the date when the

(Testimony of Frank W. De Wolf.)

reports were made so I would have a little something to tie to.

Mr. Lamey: Yes.

Q. The original report in which you recommended geophysical work was January 24, 1935, was it not? A. That is correct.

Q. If I am not correctly stating the sequence from there on, as far as reports are concerned, I would be glad to have you supply it.

A. What you have said is correct. There was no further formal report made to the company. Things were moving too [291] fast. We talked about it and telephoned to each other, wrote letters in some cases. Did I finish? No, I was interrupted.

Mr. Erickson: I withdraw my objection.

Mr. Lamey: Reporter, perhaps you could go back. I would like to have the question read.

Witness: I would like to know whether it was left in the air.

(Question and answer read back by reporter.)

A. It was one structure leading up to a major closed dome at the south end, the so-called—what is it, Little Beaver.

Q. Will you point it out?

A. (Indicating on map): The Little Beaver Dome was the dominant top on this great long anticline, and it didn't appear that the minor domes along the backbone ought to interfere with the migration of oil up into that highest part. Consequently, a location for a well was recommended to be

(Testimony of Frank W. De Wolf.)

drilled up on that high part to begin with, the first place to begin.

Q. Will you state whether or not that location you recommended was the place where the N.P. No. 1 was drilled?

A. That was the location; and I may say further it was placed far enough east of that supposed axis at depth so that even in the case of a crooked hole, it wouldn't be finished up on the wrong side of the axis, on the west side, it would finish on the east side of the fold, if possible. That well [292] as you know, was located right there, and the axis itself is over here (indicating) at the surface about a mile, and at the sub-surface, a little further east.

Q. Mr. De Wolf, on the map is written a legend. I wonder if that well you pointed out is the Smith No. 1 or the N.P. No. 1?

A. It is marked "MDU 1"—no, "N.P.", and this is the Smith just north of it about half a mile, and the Warren, of course, is up there (indicating).

Q. Now, were you in touch with the operations during the drilling of the N.P. No. 1 well?

A. Yes, I visited it and was represented by two assistants, geologists, three in fact, who were placed on the well as sample examiners. I had previously been with them in the Black Hills, examining the rocks there from top to bottom, which we expected to meet in this well, to help us in identifying them; so these young men, these three geologists, were on the drilling well on an eight-hour basis, and all of the cores and samples were examined by them and

(Testimony of Frank W. De Wolf.)

reported to me by wire and shipped to me in bags, and I kept in touch with the progress in my office, and we communicated by telephone and telegraph.

Q. What have you to say as to the formations that were found in the N.P. well, whether or not they were as you had expected, or if there were any abnormal conditions? [293]

Mr. Erickson: To which we object on the grounds of materiality and relevancy.

Court: I don't myself immediately see its relevancy, but proceed. I don't think we have to go through all the wells that were drilled.

Mr. Lamey: No, we are merely trying to show they found conditions that weren't expected, and what they were, because it does have a bearing on future development.

Court: On the operations that took place later. Very well, proceed.

A. We found conditions as expected and resembling those in the Black Hills down to a considerable depth: then we ran into a mass of salt which was unknown in this part of Montana; and still lower we ran into beds which proved later to be an extension of beds known at that time only in the Big Snowy Mountains over to the west. Those Big Snowy beds had extended east and were present in this well, to our surprise, and we were very much at a loss to know what they were for a time. Eventually it was straightened out what they were, but that introduced the possibility of irregularities in these deep beds which had not been anticipated.

(Testimony of Frank W. De Wolf.)

Q. Did you then have something to do with the location of the Warren well in Unit 5?

A. Yes.

Q. What was your part in locating that well?

A. There was a conference between Mr. Cecil Smith and myself as to locating a well up there, and I think there had been an agreement to locate the second well north of Baker, and that location was thought to be favorable, the axis having a gentle and uninterrupted slope toward a great big gathering ground on the east side, so that location was decided on.

Q. Did you also have some part in locating Smith No. 1? A. Smith No. 1?

Q. Yes.

A. Yes, that was located, that location was agreed on at a time when we rather hoped N.P. No. 1 was going to be a producer, and the Smith well, therefore, was located not too far away from the N.P. well, and in a direction that would be thought to be favorable. I may say after those three wells, I had nothing more to do with the further locations, including the current work that is being done.

Q. Now, were you able to correlate findings from logs, say in the N.P. Well No. 1, and the Warren well in Unit 5? A. Yes.

Q. And in what way did that give you information or assistance in your geological findings and advice?

A. The correlation of the two wells was very satisfactory, and as a result, of course, the Warren

(Testimony of Frank W. De Wolf.)

well was found to be much lower structurally, down the plunge of this anticline northward from the high place. The height above sea level of [295] the sand which was reached in the Warren well was four or five hundred feet lower than the same bed was in the No. 1 N.P. well, if that is what you have in mind, that situation.

Q. Now, you have made reference to the fact that it was your conclusion that the Cedar Creek Anticline constituted one structure? A. Yes.

Q. What do you mean by a structure?

A. Well, this is a feature having—this is a feature having certain characteristics throughout of being an up-lifted mass of rocks with slopes right and left, and also plunging toward the north, and that is a structure, or structural features having identity.

Q. You stated something with reference to a conclusion on whether or not oil could migrate from one end of the structure, or one place in the structure to another. Will you please amplify that some, tell us what you had in mind?

A. Yes. In general as oil and water occur in a porous rock, and that rock is tilted, there is a tendency for those fluids to migrate up the tilt, and for the oil to be found resting on the water and to be trapped on the top of the structure, beneath which there might be water. Now, so far as we knew, when we started, the beds in this structure were all rising toward the south, and there would be a chance for the oil to migrate up to the south,

(Testimony of Frank W. De Wolf.)

and we located our first well in the [296] south end on that account. The introduction of these Big Snowy beds in there, to our surprise, complicated the picture, and it is quite evident that if any one bed pinches out and doesn't continue up to the south end of the structure, the oil may be trapped in that bed where it pinches out, where it becomes shaley, or ceases to continue, so the introducing of these Big Snowy beds complicates the picture. You may find oil, in my opinion, in various places on that structure now, rather than to expect it all to migrate up to the high end of the structure.

Mr. Lamey: You may cross examine.

Cross Examination

Q. (By Mr. Erickson): Mr. DeWolf, what was the last of the active work you did on the Cedar Creek anticline by way of consultation with Fidelity Gas or with Cecil Smith, or anybody else in that connection?

A. I cannot tell you for certain, but I presume—well, I can't tell you. It was a long time ago.

Q. Did you see the logs on the Carter well?

A. I was furnished a log of the Carter well, but gave no advice on it.

Q. Did you make a study of that log?

A. Yes. [297]

Q. Were you furnished a log of the Husky well? A. No.

Q. You are aware, Mr. DeWolf, there has been extensive geophysical work on the Cedar Creek An-

(Testimony of Frank W. De Wolf.)

ticline, particularly since the year 1950, are you not?

A. Well, I know the Carter Company did some geophysical work before drilling the well.

Q. But as to the more recent rather extensive geophysical work, you are not familiar with it?

A. I am not familiar with it, no.

Q. I believe you made it clear that migration would be interrupted by the presence of synclines, is that correct? A. Yes.

Q. So, in an examination of the map and the profiles that are shown—you will understand I don't know much about geology—in looking at the map, Exhibit 1-A, you have made reference to the Little Beaver area, and as you go north through Unit 8-A and 7 and up to Unit 6, there seems to be what would appear to be some sort of a pinching out. Would that indicate a syncline to you, or what is that?

A. I would call that a saddle between two domes, a low place between two domes; that isn't a pinching out. The thing you are describing now is a structural feature, it has a dome, it goes down to a saddle. The pinching out I refer to is in the sand itself, or in the rock bed down below the [298] surface.

Q. Would the presence of a saddle like that, carried clear down to the oil sands, tend to interrupt the migration of oil in a northerly-southerly direction along the anticline?

(Testimony of Frank W. De Wolf.)

A. Yes, that was the purpose of the work, to see whether down at the Madison and Dakota, to see if they were magnified and stronger than on this map, and the result was they didn't seem to be.

Q. Would your last answer I made some objection to, and which I withdrew, show geophysical work was done in the area adjacent to the City of Baker? A. Yes.

Q. And can you tell from your recollection now whether the geophysical work in that area indicated that this structural feature to which we refer—it is just above the words “Unit No. 6”—is the same as shown on the map, or approximately so?

A. May I glance at this to see how close this cross section is to Baker? There is a cross section right at Baker shown on this map, and I don't know why this couldn't be introduced in evidence.

Mr. Lamey: Have it marked if he is going to testify from it.

A. And the condition as revealed by the geophysical work was closely similar to what you see on that map there, I would say not appreciably different. [299]

Mr. Erickson: I believe it may be stipulated that Exhibit 40 may be introduced as part of the defendants' case.

Mr. Lamey: With this understanding: I think we have some photostats of it. We would like to substitute. I know Mr. DeWolf would like to keep it.

Witness: This is your photostat.

Court: Very well, it is admitted.

(Testimony of Frank W. De Wolf.)

(Defendants' Exhibit 40 admitted in evidence.)

Witness: And I might make another statement for the record, if I may. These cross sections which are shown in red on Exhibit 40, were also connected by a lengthwise section running along the backbone of the structure, as dotted on this map, and by mistake, it has not been colored red. It should also be colored red as indicating a tie between the cross sections.

Q. There is then running down through the heart of the map, Mr. DeWolf, a dotted line which intersects the red cross lines all the way down, is that the line you have referred to?

A. Yes, that's right.

Q. Now, with reference to your map 40, does that cover the whole anticline?

A. No, that is the south half of it.

Q. So, it would correspond to Exhibit 1-A as far as area is concerned?

A. Yes. I may say the geophysical work did go [300] further north, and include work—it came up about that far (indicating).

Mr. Lamey: How far is that?

A. To the north line of Township 9 North.

Mr. Erickson: The south line of Unit 3 and the North line of Unit 4.

Q. And I believe your testimony then was that as to the structural features at the Woods Unit, Number 6, your geophysical work indicated that was

(Testimony of Frank W. De Wolf.)

an approximation of what the sub-surface was, is that correct? A. Correct.

Q. As to this matter of migration, Mr. DeWolf, is it not a fact that the recent studies on the part of geologists indicate that migration is not as extensive in those subterranean beds as thought in the early days?

A. Well, we have some new kinds of traps we are talking about nowadays, stratigraphical traps which are caused by the pinching out of porous beds where they become impervious or bump up against obstructions that tend to seal in any oil that is there just as effectively as a dome would. Therefore, oil might arise and be trapped in that sense. I think migration is still a great factor where beds are sloping as they are here.

Q. Twenty years ago, geologists generally would have believed in looking at this structure that oil in the lower sands would migrate freely up and down the structure, so that oil [301] in Unit 6 might have some effect as to drainage at a very great distance away, is that correct?

A. Yes, in general, but I would like to say if the backbone is flat, the backbone isn't rising much, the friction in the rocks might check the oil, and if it is a slightly dipping bed, it might migrate up, but on a flat back structure, like the roof of a house, for instance, it might not migrate the full distance.

Q. You are testifying now with particular reference to this Cedar Creek Anticline?

A. Yes. There was a question whether that back-

(Testimony of Frank W. De Wolf.)

bone would check the migration. That was mentioned in my report, the possibility we might, that we might have individual fields there; but I may add this: As a rule a closed structure, weaker than 200 feet of closure, if you know what that means, is not likely to be significant in the Rocky Mountain region. Our known fields in the Rocky Mountain region mostly have closures greater than 200 feet, and these little domes on here don't have. None has more than 100 feet, I don't believe.

Q. In your opinion as a geologist, would the drilling of a producing oil well in the Little Beaver dome be any indication that you might get similar results in Unit 5?

A. It would be encouragement for any place along that backbone.

Q. But that would be the extent of the value you would give [302] to a successful well there, is that correct—I just want to have——

A. You would have a possibility of production, yes, and particularly, of course, with the pinching out of beds and the Big Snowy section developing, the whole thing is wide open.

Q. Do you know of the drilling of the Stanolind well in Section 15, 9 North, 58, which would be just above where your map leaves off and where Exhibit 1 begins?

A. Is that a modern, recent well?

Q. Yes, within the last——

A. No, I don't know nothing about it.

Q. If I were to tell that well was drilled in Sec-

(Testimony of Frank W. De Wolf.)

tion 15, 9 North, 58, to a depth of 9649 feet, and the well was a non-producer, was dry, what effect would you say that would have on an evaluation of Unit 5, which is the one that joins?

A. I couldn't answer that offhand.

Q. Would it indicate that there was then in between Unit 5 and the Cabin Creek Unit up here (indicating) a syncline?

A. I don't know. I haven't seen the log, and I would have to study that before I could answer it. Did it go to the granite, what beds did it reach?

Q. It went through the Ordovician, and found the Ordovician 299 feet lower in Section 15, Township 9, Range 58 than it was in the Cabin Creek area.

A. I am not competent to answer that, I am afraid. [303]

Q. You made some reference to your participation in the location of the Warren well. Did you recommend that location without regard to any contract commitments that the Montana-Dakota Utilities or Fidelity Gas might have had?

A. No, I can't say that I did.

Mr. Lamey: Mr. DeWolf, do you have that first report with you? Counsel would like to see it.

A. Yes, this is it.

Mr. Erickson: The only thing I have left to ask Mr. DeWolf would be about this report. I wonder if we could have a few minutes so I could take a look at it?

(Testimony of Frank W. De Wolf.)

Court: Yes. Court will stand in recess until 10 minutes after 11. That will give you 15 minutes.

(15-minute recess.)

Q. Returning again to the Stanolind well, and for an expression of an opinion on your part as a geologist, if the record shows that the Stanolind well was drilled, as indicated, in the area just north of where you completed your work, and if it were shown by the testimony that the Ordovician at that point, the Ordovician being producing sands, if the records show that in the well just north that is 299 feet lower, what would that indicate to you as to the effect of a successful drilling in Cabin Creek, with relation to the area in Unit 5, with the added fact that the well was a non-producer in the Ordovician? [304]

A. This location, as counsel has shown it on the map, is right on the steep side of this anticline, right on the steep flank where the contours are very close together. If this were literally true, it would be bound to be a low well. It starts low.

Q. Assume the Ordovician where production was was 299 feet lower in this well, and the Ordovician there, it was non-productive, the combination of the fact it was lower and non-productive, what would you say as to your opinion as to whether the Shell wells in the Cabin Creek Unit, because they are productive, would that be any indication that similar drillings in Unit 5 down there, with the same relative location along the sharp—

A. I think it would have a chance, yes, surely.

(Testimony of Frank W. De Wolf.)

Q. What do you mean by that?

A. This may be just an isolated low well, and south of it in Unit 5, conditions may be more favorable, I should think.

Q. That's right, but by reason of the results that are found in here, would successful development of these wells (indicating) tend in any manner to prove or disprove the fact there might be successful drilling in Unit 5?

A. I think so.

Q. In what way?

A. Because you have got another high structure, another one of those little domes there under "8", and it is on the trend. This other thing, I think, is off the trend, to the west of it, [305] isn't it?

A. The well was drilled in the northeast quarter of the northwest quarter of the section, and the red dot, which is on Exhibit 1 right opposite the words "Cabin Creek Unit" would be an approximation of the location.

A. I wouldn't like to be too opinionated about that hypothetical question, it is a little complicated.

Q. Would it tend——

Mr. Lamey: May it please the Court, I have not objected because I realize we have an expert witness here, but I am now going to object that any further questions along this line, based upon facts assumed by counsel and not established as facts in evidence, ——

Mr. Erickson: We will introduce that testimony later. I understand Mr. DeWolf is going to leave. He has given his expert opinion that it is all one

(Testimony of Frank W. De Wolf.)

structure and operation in one area. I really intend to prove another area.

Court: On your representation that you will present the facts with reference to your question, then, I will permit you to proceed with the examination.

Q. If the facts are as represented as to the Stanolind well, can you say whether that would tend to indicate one way or the other whether there is a definite change of structure, or rather that the Cabin Creek area, Unit No. 2, is not the same structure as Unit 5 insofar as the lower sands are concerned? [306]

A. I think the location of the Stanolind well is very unfavorable; it doesn't prove anything. It is deep down on the west side.

Q. If the testimony shows another well was drilled, the McDonald well, which is in Section 26, the southwest quarter of the southwest quarter of 26, 58, 10, was drilled to the Ordovician, and it also was non-productive, having reference to its location, would that have any bearing on your opinion as to whether or not there might be some difference structurally between the area in Number 2 and the area in Unit 5?

A. I should like to say that before anyone could answer that question, you would have to compare the log of that well with the logs of those producing wells just to the west of it and see whether the strata are the same, and whether you haven't slipped off the structure to the east into a low place.

(Testimony of Frank W. De Wolf.)

Q. Your testimony, insofar as the geophysical work upon which you were relying on, it did not extend up into Township 9?

A. What did not extend, the geophysical work?

Q. Yes.

A. Yes, it extended to about the north line of 9. I will show you——

Q. That is a sufficient answer.

A. It extended to that point there (indicating).

Q. Which would be on the north line of Township 9, Range 58? [307]

A. That is the extent of it, yes.

Q. Now, in going all through your report, Mr. DeWolf, I find that it was limited to and discussed only certain sands, and didn't include the Ordovician. Did your study eliminate the Ordovician?

A. The Ordovician was at such a great depth back in 1935, I wouldn't dream of spending the money to drill to the Ordovician. I rather recommended in that report that they stop at the bottom of the Sundance formation; I didn't dream of going to the Ordovician.

Q. Tell us approximately what the Sundance depth would have been in your study?

A. I could tell you what it was on the N.P. No. 1 well as reached.

Q. What is that depth?

A. Pardon me, I'll look at the log. The top of the Sundance in this log was at 4025, that is the N.P. No. 1; the top of the Sundance, as stated, was interpreted to be at 4025, and the bottom of it and

(Testimony of Frank W. De Wolf.)

the top of the Spearfish, so-called, at 4586, about that, question mark.

Q. The log of the N.P. No. 1 well didn't show anything on the Ordovician, did it?

A. It probably did not reach the Ordovician. We didn't know for sure whether it was Devonian or Ordovician. We didn't know.

Q. One more question, Mr. DeWolf. On this map, in terms of [308] geology and in terms of oil well drilling, some wells are classified as wild cat. You are familiar with that, of course. Now, if you drill on this high and find production, and know it is a separate high, for example, the one in Unit 5, 30 miles away, how would you classify the new well?

A. Very problematical, no assurance as to its success. In that connection it might be called a wild cat, but it has got a reason for location. Many, many wild cats are just a stab in the dark without any reason for location.

Q. Did you write any letters to the Fidelity Gas Company after the completion of the Warren well concerning this general problem of development of the geological features of the Cedar Creek Anticline?

A. I don't know.

Q. At least you have none with you, is that correct?

A. That is correct.

Q. Do you have any written recommendation to the Fidelity Gas Company as to the drilling of the Warren well with you?

(Testimony of Frank W. De Wolf.)

A. I have my original recommendation of the location, yes.

Q. Do you have that there? A. Yes.

Q. May I look at it?

A. I would be glad to show it to you. There is a—do you want me to read that?

Q. May I look at it first and then determine whether we need [309] it in the record? Thank you, Mr. DeWolf. Did you have any oral discussion with Mr. Smith or anyone else at Fidelity Gas after the Warren well was completed concerning it, Mr. DeWolf?

A. Yes, we followed the drilling of the Warren well and followed the samples and discussed it as we had discussed all the other wells as the work went on.

Q. Did you recommend additional drilling in Unit 5 after the well was completed?

A. No, I wasn't asked to.

Q. You gave no opinion to the Fidelity Gas as to whether further drilling in Unit 5 would be warranted?

A. I don't know, that having been 20 years ago, I don't know.

Q. If you did, you don't recall it?

A. I don't, no.

Q. How long has it been since you have worked professionally for Fidelity Gas in connection with this field?

A. Montana-Dakota Utilities Company, I haven't

(Testimony of Frank W. De Wolf.)

worked for them since this work was finished, whenever that was, what was it, 1937, 1938.

Mr. Erickson: I believe that is all.

Mr. Lamey: That is all.

Court: The witness may be permanently excused?

Mr. Lamey: Yes, your Honor.

Mr. Erickson: He may. [310]

(Witness excused.)

HERMAN F. DAVIES

called as a witness on behalf of defendants, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Lamey): State your name and residence?

A. My name is Herman F. Davies; my residence is Oakland, California; my office is at San Francisco, California.

Q. What is your occupation at the present time?

A. I am President of the California Exploration Company, a wholly owned subsidiary of the Standard Oil of California.

Q. And how long have you been president of that company? A. About six years.

Q. And as president, in what phase of the oil industry do you deal?

A. We are primarily concerned with exploration work in foreign countries.

Q. And are you a geologist by profession?

(Testimony of Herman F. Davies.)

A. Yes.

Q. Where did you receive your formal education in Geology?

A. I received my Mining Engineering Degree in Geology at the University of Minnesota in 1921, and my Master's Degree in Geology at the Massachusetts Institute of Technology in 1922.

Q. And did you work at your profession?

A. Yes, I joined the California Company, another subsidiary [311] of the Standard here in Billings in 1923. I spent 18 years in the Rocky Mountain District. I was Junior Geologist to commence with, District Geologist from 1930 to 1936, manager of the northern division with headquarters at Denver from 1936 to 1941, Vice President of the California Company from 1941 to 1942, in charge of exploration and development. Since 1942, I have been primarily concerned with foreign developments and exploration.

Q. Now, were you in Billings in connection with your work for the California Company in 1935 and 1936?

A. Living here you mean?

Q. Yes.

A. No, my residence and headquarters office was at Denver. The Denver office covered all the Rocky Mountain District at that time.

Q. In about the summer of 1935, did you have occasion to become acquainted with the Cedar Creek Anticline, which is indicated on the maps, Exhibits 1 and 1-A on the wall?

A. I became acquainted with the Cedar Creek

(Testimony of Herman F. Davies.)

Anticline back in 1923, did some work out there in a very preliminary way, and followed its development, as you will, in connection with oil exploration. Specifically, we did become interested in the Cedar Creek Anticline in 1935 when we made contact with the Montana-Dakota Utilities Company and commenced negotiations to work out a joint venture deal with them. [312]

Q. Do you recall the commencement of the drilling of the N.P. No. 1 well in the Little Beaver area?

A. I recall it started either in the summer or fall of 1935, yes.

Q. Did your company, and under your supervision, have any connection with the well, I mean as far as observing it and having a representative present?

A. While we were negotiating with the Montana-Dakota, they furnished us this geophysical work that Dr. DeWolf referred to. We also made a preliminary examination of the geological literature. While the well was drilling, we had a development superintendent, Mr. Charles Potter, and a geologist, Mr. Bremner at the well, Carl St. John Bremner. They spent approximately 60 days there while that well was being drilled; as I recall, it would be about September and October. We were unable to reach an agreement with the Montana-Dakota in regard to deeper development and negotiations were discontinued.

Q. Mr. Davies, I show you Defendants' Proposed Exhibit 41, purporting to be a letter dated

(Testimony of Herman F. Davies.)

June 11, 1936, to R. M. Heskett. I will ask you whether or not you signed the letter?

A. I did.

Q. And does that bring to mind a phase in your negotiations with Montana-Dakota Utilities and Fidelity Gas Company in connection with the acreage on the Cedar Creek Anticline? [313]

A. Well, yes, of course that acreage was involved in our original negotiations in 1935, and we resumed negotiations again in the spring of 1936.

Q. In 1935 when you first began your negotiations, were you made acquainted with certain rights held under Fidelity operating agreements and other agreements that Fidelity and other M.D.U. companies may have had? A. That is correct.

Q. What is your recollection as to the extent of those interests in the Cedar Creek Anticline?

A. My recollection is that they are essentially as represented on this map here in the eight units, covering in general the south two-thirds or three-quarters of the Baker-Glendive Anticline.

Q. What have you to say as to whether or not they included lands shown on Exhibit 1-A in Unit 5, there marked with pink?

A. They did include that, yes.

Mr. Lamey: We offer Exhibit 41.

Mr. Erickson: No objection.

Court: Very well, it is admitted.

(Defendants' Exhibit 41 admitted in evidence.)

Q. You may keep that just a minute, Mr. Davies,

(Testimony of Herman F. Davies.)

to refer to. On or about June 11, 1936, the date of Exhibit 41, will you state whether or not negotiations were resumed on behalf of the California Company with Mr. Heskett and other officials of [314] Fidelity?

A. That is my recollection that we did, yes.

Q. Now, at that time, what type of development was your company interested in?

A. Well, commencing about 1935, our company became quite interested in what is now known as the Williston Basin, and we were very much interested in the Paleozoic formations which occurred in the Williston Basin of Western North Dakota and Eastern Montana, Alberta and Saskatchewan. We took up considerable acreage during that period from 1935 to 1937 on a number of structures in Montana, Alberta and North Dakota. We drilled a deep well in North Dakota, which had as its primary objective the Mississippian and Devonian and Ordovician. We likewise drilled a well in Alberta with the same objectives and contributed to a well at the east end of the Cat Creek Anticline.

Q. Were you interested in the possibilities of drilling a well in the Cedar Creek Anticline to the same formations? A. Yes, we were.

Q. And on that basis, did you resume negotiations with the Fidelity officials on or about June 13, 1936? A. We did.

Mr. Erickson: To which we object on the grounds it is immaterial, irrelevant. The statement has already been made by counsel that the negotiations

(Testimony of Herman F. Davies.)

resulted in no contract. It [315] wouldn't serve to illustrate any issue in this case.

Mr. Lamey: We intend by this witness to carry on the same negotiations up until January of 1939. We think it is material, particularly with reference to abandonment, for it was during the period of 1937 and 1938 the witnesses testified they were told they were all through.

Court: Very well, proceed. The objection is overruled.

Mr. Lamey: I think that question was answered.

(Question and answer read back by Reporter.)

Q. All right, and following that, do you recall that Fidelity went ahead with the drilling of the Warren well in Unit 5 and the Smith No. 1 in the Little Beaver area?

A. If I remember correctly, at the time we resumed negotiations in 1936, the Smith, or the N.P. No. 1 well had reached the Mississippian. It was the intention of Montana-Dakota Utilities to drill a well on Unit 5 to test the Amsden formation and the Mississippian, and they approached us as to whether we would be interested in such program. It was the opinion of our geologists at that time that we were primarily interested in testing the pre-Mississippian formations, namely, the Devonian and Ordovician, and as the Montana-Dakota Utilities Company was not willing to deepen the N.P. 1 well at that time, we withdrew.

Q. Now, later did negotiations resume?

(Testimony of Herman F. Davies.)

A. Yes, following the drilling of the Warren well and the [316] Smith well, which I believe reached the Mississippian, we again approached the Montana-Dakota Utilities Company with the idea of entering into a joint venture with them, including all the acreage that they held on the Baker-Glendive Anticline for the purpose of drilling a deep test to the Devonian and Ordovician.

Q. About when was that?

A. That was, if I recall correctly, the fall of 1937 and all of 1938 and up until January, 1939.

Q. And during the period from the fall of 1937 until later in 1938, did you, on behalf of your company, carry on bona fide and serious negotiations with Fidelity with reference to these lands in which they had interests in the Cedar Creek Anticline?

A. Yes, we not only carried on negotiations, but in the fall of 1938, during the months of October and November, we carried on geophysical seismic work.

Q. Subsequently was the matter submitted to the Board of Directors of the California Company for which you were working?

A. That is correct.

Q. About when was that?

A. That was in December, 1938, I believe, or early January, 1939.

Q. And following that—strike that question—I will show you now Defendants' Exhibit 42, and ask you if you can identify [317] that letter?

A. Yes, it is my signature.

Q. Was that the document through which you

(Testimony of Herman F. Davies.)

informed the officers of Fidelity that your company had decided against going into the agreement?

A. This letter is addressed to Mr. Heskett as Vice President of Montana-Dakota Utilities Company, and through him we advised that we would not be interested in continuing negotiations.

Q. Let me show it to counsel. During this period from the fall of 1937 in to late 1938, with whom were you carrying on negotiations?

A. Primarily with Mr. Heskett and Mr. Cecil Smith.

Q. And during the period of these years, 1935 into 1938, did you have occasion to visit Minneapolis frequently?

A. Yes, I was there several times. It so happened my family lives there, and furthermore, we were carrying on a very active leasing campaign in North Dakota, and much of that land was in the hands of the bank at St. Paul, so it was necessary to go back and forth quite frequently to carry on negotiations in regards to that land, and naturally, I stopped in to see Mr. Heskett or Mr. Smith at the same time in order to keep our negotiations moving in connection with the Cedar Creek Anticline.

Mr. Erickson: No objection.

Mr. Lamey: We offer Exhibit 42. [318]

Court: It is admitted.

(Defendants' Exhibit 42 admitted in evidence.)

Q. Now, I have understood you to say that your company did some geophysical work on portions of

(Testimony of Herman F. Davies.)

the Cedar Creek Anticline during the latter portion of your negotiations, is that correct?

A. That is correct.

Q. And was your company interested in taking over interests on the entire anticline? A. Yes.

Q. You spoke awhile ago of the Baker-Glendive Anticline. I would like to ask you if that is the same as the Cedar Creek Anticline?

A. That is correct, in the early days in the coal surveys, it was referred to as the Baker-Glendive anticline. Later the name was changed to the Cedar Creek Anticline.

Q. And what was there about the Cedar Creek Anticline that caused your company to be interested in all of the acreage that could be turned over by Fidelity and others?

A. Well, naturally, if one was to drill one portion of the structure, such as down in Unit 8, and it was productive, they would be interested in trying to develop oil all along the anticline, and the time to control acreage is before a well is drilled, and we are rather land hungry at times, and naturally we like to have all the land we can get. [319]

Q. Why was it your company finally, in January, 1939, withdrew from further negotiations and the entering into the contract?

A. Primarily for two reasons, one, we were unable to reach terms that we considered entirely satisfactory, and secondly because of the general marketing conditions of our company and the general area.

(Testimony of Herman F. Davies.)

Q. By marketing conditions, do you mean the marketing of crude or gasoline?

A. The marketing of crude, yes.

Q. Explain that just briefly?

A. Well, as you all know, the Cedar Creek Anticline, at least back 20 years ago, was relatively uninhabited, a relatively uninhabited area. The demand there for gasoline and production were much less than they are today, and in order to market any crude from that area, you would either have to have enough which will justify a pipeline, we will say to the Twin Cities, or a smaller amount which would necessitate building a local refinery, and our economists came to the conclusion that the pay out on a small refinery would be so long it was unattractive, and the investment in order to develop a sufficient amount of crude to justify a pipeline to the Twin Cities was more than they wanted to undertake at that time.

Mr. Lamey: You may cross examine. [320]

Cross Examination

Q. (By Mr. Erickson): With reference to the last questions and answers, it is true also that the price of crude was very low at that time, is that correct?

A. Correct.

Q. Do you have with you Mr. Davies the various proposals and counter-proposals having to do with the second series of negotiations you carried on with Montana-Dakota Utilities?

A. No, our company follows the policy of de-

(Testimony of Herman F. Davies.)

stroying most of its correspondence after a period of years. That correspondence has been destroyed.

Q. Your letter of the 9th of January, 1939, Defendants' Exhibit 42, in the first paragraph, says, "I presented to the San Francisco office our entire plan for future development of the Cedar Creek Anticline along the lines discussed with you, namely, a 75-25 split." What does that 75-25 split refer to?

A. The type of agreement we were discussing at that time was that we would receive 75 per cent of the net proceeds and Fidelity and Montana-Dakota would receive 25 per cent, as I recall.

Q. Now, do you know how you arrived at a determination of what were the net proceeds in the negotiations, if there were any, if there were any net proceeds? [321]

A. I can't give you the details now; I haven't seen that contract for 15 years.

Q. Do you recall that consideration was taken of the existence of the Fidelity gas agreement in trying to work out what would be the net proceeds?

A. As I recall, there were two agreements, one with Fidelity and one with Montana-Dakota Utilities.

Q. But so far as you can now recall, the 75-25 was a net proceeds split?

A. That is the way I remember it, yes.

Q. Do you recall whether in arriving at the net an account was taken of the amount of royalties to be paid to the holders of the fee and Federal Government?

A. I don't remember.

(Testimony of Herman F. Davies.)

Q. Can you recall who made the 75-25 proposal?

A. No, most of those proposals are by horse trading, we come to them by bargaining. I don't know who initiated or who first suggested 75-25.

Q. With relation to this breaking off of negotiations, do you recall whether one of the reasons for breaking off negotiations was this 75-25 split?

A. I can't answer that question, no.

Q. You can't recall now whether there was agreement between the parties on the 75-25, is that correct?

A. Which parties? [322]

Q. You and Fidelity and you and Montana-Dakota Utilities.

A. We were negotiating along those lines; we hadn't reached an agreement that had been executed.

Q. But, so far as the 75-25, you had generally agreed on that feature of it, is that correct?

A. I think so, at least in principle.

Q. Do you recall how the cost of drilling was to be handled under the various proposals?

A. If I remember correctly, we were to first spend enough money to equal the amount spent by Montana-Dakota Utilities, which was somewhere between three and four hundred thousand dollars on Unit 8, and I don't recall the amount in Unit 5. After having equalled that amount, then I believe the expenditures were either—this I don't remember, whether it was 50-50 or 75-25, but I think it was 75-25.

Q. Now, why are you sure now that the negotia-

(Testimony of Herman F. Davies.)

tions, in view of your inability to remember some of these details, included the lands that are marked in red, the specific lands marked in red in Unit 5?

A. Attached to our agreement there was an exhibit which included all the lands; furthermore, there was a summary of the acreage, which indicated all of Unit 5 was included.

Q. You don't have that summary?

A. I don't.

Q. You don't have the map either, I understand?

A. No.

Q. Now, the proposal that had the map, was that in negotiation between you and Fidelity or between you and Montana-Dakota Utilities?

A. I didn't hear the question.

(Question read back by Reporter.)

A. We were negotiating with both of them.

Q. But the negotiations were separate as to the two companies, is that correct?

A. If I remember correctly, yes, but we were negotiating with the same individuals.

Q. Yes, but in the negotiations, there was recognized a difference between the acreage owned outright by M.D.U. and that which it held under Fidelity, is that true? A. Correct.

Q. Now, you have indicated that you did a considerable amount of seismic work there, and you also indicated your primary interest was, did I understand you to say the pre-Mississippian?

A. Correct.

Q. Can you tell us what the results of that seis-

(Testimony of Herman F. Davies.)

mic work were as to your conclusions concerning the desirability of drilling to the greater depths?

A. We were primarily interested in learning by this seismic work whether the Smith well and the N. P. well were properly [324] located on the lower horizon structurally, or whether it would be necessary to drill a separate well, and I think, as I recall, it proved the N.P. and Smith were satisfactorily located, and it was a matter of deepening one or the other, depending on which was in the best mechanical condition.

Q. I believe you testified your negotiations with Montana-Dakota Utilities or Fidelity looking toward the deepening of those wells was not successful, is that correct?

A. Not successful as to terms, yes.

Q. It was your inability to get together on terms that prevented you making a deal on those wells, is that true?

A. In part.

Q. Were there any similar negotiations as to the Warren well?

A. Not except it was included in all the acreage involved.

Q. But there were no negotiations on the Warren well as to deepening it, is that correct?

A. We had that option.

Q. But those negotiations weren't of the same nature as the ones concerning N. P. No. 1 and Smith, is that correct?

A. I would say they were.

Q. That is what I wanted to find out.

(Testimony of Herman F. Davies.)

A. In this, it was all one part and parcel.

Mr. Erickson: That is all.

Mr. Lamey: No redirect. [325]

Court: May this witness be excused?

Mr. Erickson: He may as far as were are concerned.

Mr. Lamey: Yes.

(Witness excused.)

Court: Very well, Court will stand in recess until two o'clock.

(Noon recess.)

CECIL W. SMITH

called as a witness on behalf of defendants, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Lamey): Is your name Cecil W. Smith, and do you reside in Minneapolis, Minnesota?

A. My name is Cecil W. Smith, and I reside in Minneapolis.

Q. What position, if any, do you hold with the Montana-Dakota Utilities Company?

A. I am President of the Montana-Dakota Utilities Company.

Q. How long have you been such officer?

A. Since about the middle of 1954.

Q. And who held the office of President immediately preceding the date you mentioned?

A. Mr. R. M. Heskett.

(Testimony of Cecil W. Smith.)

Q. What office, if any, do you hold in the Fidelity Gas Company? [326]

A. I am Vice President of the Fidelity Gas Company.

Q. Who is president of that company?

A. I believe Mr. W. L. Hayes.

Q. What is your profession other than in this capacity as President of the one company and Vice President of the other?

A. I graduated from the University of Illinois as a Mining Engineer.

Q. When was that? A. 1913.

Q. And when did you first come with the companies, any of the predecessor companies of Montana-Dakota Utilities? A. In August, 1927.

Q. What did you do between graduation from the University and your employment with the Montana-Utilities group?

A. I worked with various coal companies in Illinois, with a subsidiary of the Steel Corporation, United States Steel Corporation, in Pennsylvania, with the Bureau of Mines in Pittsburgh, Pennsylvania.

Q. Now, with what company of the M.D.U. group did you first become associated?

A. The Minnesota Northern Power Company.

Q. And what became of that corporation, if you can say, please?

A. That corporation was merged into several of the subsidiaries, [327] I believe, in 1935, at which

(Testimony of Cecil W. Smith.)

time the Montana-Dakota Utilities Company was the resulting or surviving corporation.

Q. As a matter of fact, at that time, was there not quite a merger of smaller companies into the Montana-Dakota Utilities Company?

A. That is correct.

Q. Something has been said in the testimony thus far with reference to a company known as Gas Development Company. Will you tell us if that was one of the predecessor companies of Montana-Dakota Utilities?

A. Gas Development Company was the predecessor company, the company which originally acquired leases and carried on operations on the Cedar Creek Anticline, and was merged into the Montana-Dakota Utilities Company in about 1935.

Q. Am I correct in understanding that some of the early gas purchase agreements were made with this Gas Development Company?

A. That is correct.

Q. What about the gas unit agreements, such as has been marked here as Exhibit 3, were they with Gas Development or some other company?

A. I believe some of the early ones were with Gas Development Company.

Q. Do you know whether at the present time, and for some time, is it correct that all of the gas operations have been under [328] I will say M.D.U., instead of going to Montana-Dakota Utilities each time?

A. That is correct.

(Testimony of Cecil W. Smith.)

Q. What is the relationship of Fidelity Gas Company to M.D.U.?

A. Fidelity Gas Company is a wholly owned subsidiary of Montana-Dakota Utilities Company.

Q. What is its particular function in connection with the over all operation of your group?

A. It has carried on leasing and development activities.

Q. Is that both with reference to oil and gas?

A. That is correct.

Q. When did you first become acquainted with the operations in the Cedar Creek Anticline so far as your companies are concerned?

A. The companies' operations on the Cedar Creek Anticline began in 1926. I first became acquainted with the operations on the Cedar Creek Anticline in 1927, when I came with the Minnesota Northern Power Company.

Q. Now, what were the operations of the company at that time in general?

A. In 1926, gas development was started in the Cabin Creek area on the Cedar Creek Anticline for the supplying of gas to Glendive, Montana.

Q. Later on was there other development of gas throughout the [329] Cedar Creek Anticline?

A. Yes, in succeeding years.

Q. When?

A. It began in 1927, 1928, and was continuous from there on.

Q. Through what portion of the Cedar Creek Anticline did the gas development extend?

(Testimony of Cecil W. Smith.)

A. It gradually extended from what was called Unit 1 to the south end of the field, which is now designated as Unit 8-A as shown on the map.

Q. Now, where was this Unit 1 with reference to the Pine Unit as shown on Exhibit 1?

A. That is in the south end of the Pine Unit as shown on Exhibit 1.

Q. From what sand was gas being produced?

A. It was being produced from the Judith River sand.

Q. Did the Northern Pacific Railway Company have lands in that Cedar Creek Anticline at the period you just described? A. They did.

Q. And to what extent?

A. The Northern Pacific Railway Company owned every other section on the anticline with the exception of Township 8 North, Range 59 East, which is in Unit 5. The Northern Pacific did not own any lands in North Dakota where the structure extends beyond the State of Montana. [330]

Q. Were any of your gas development operations on N.P. lands back at that early time?

A. Yes, they were.

Q. To what extent?

A. They were to a considerable extent on the N.P. lands. One of the first gas leases which had been made was covering Northern Pacific lands in Units 2, 3 and 4.

Q. And later on, did you get other leases on N.P. lands in the other sections of the anticline?

A. I believe in 1928 we made a lease on North-

(Testimony of Cecil W. Smith.)

ern Pacific lands in the area south of Unit No. 5, and in some of the townships adjoining Unit No. 5.

Q. And was your company taking gas out of that area and distributing it somewhere in Montana and North Dakota?

A. In 1926, distribution was started in Glendive, Montana; in 1927, the pipe line was built to Miles City, and distribution started in Miles City and one or two small intervening communities between the Cabin Creek field and Miles City; in 1928, a pipeline was constructed from the Cedar Creek Anticline to communities in the north end of the Black Hills, where distribution of gas was started; In 1930, pipelines were built to Williston, North Dakota and Bismark, North Dakota, and gas distribution was started in those cities and in the intervening communities.

Q. Were you taking some gas at that time from the lands [331] involved in this action? By "that time" I mean these early years, 1926, 1928?

A. I believe that the only lands that were producing gas and that we were distributing were those of the Cedar Creek Oil and Gas Company, with which company contracts were made early in 1929.

Q. What have you to say as to the amount, proportionate amount of Government land in Unit 5?

A. Unit 5 consists largely of Government lands.

Q. What about Government lands throughout the Cedar Creek Anticline at this early date?

Mr. Erickson: To which we object because we don't believe it is relevant and material.

(Testimony of Cecil W. Smith.)

Mr. Lamey: I am trying to get a background. I don't intend to pursue it too far.

Court: Very well, you may answer the question. The objection is overruled.

A. A large portion of the intervening lands checker-boarded in with the Northern Pacific Railway lands in the structure were Government lands under which the oil and gas had been reserved to the Government.

Q. I believe it was Mr. Wight who testified about a situation that arose in Unit 5 concerning the payment of compensatory royalties on Government land. Would you know anything about that, back in the early '30's? [332] A. Yes, I would.

Q. Will you just explain what is meant by compensatory royalties in particular reference to Government lands?

A. Wells drilled on lands adjacent to Government lands were in operation in Unit No. 5, and the Government felt that their adjoining lands were being drained of gas, and they had computed, according to a formula that they used, and estimated the amount of drainage, and they had assessed against the owners of those lands a royalty to compensate them for drainage. That is what is meant by the compensatory royalty.

Q. Now, then, as against that, did not the permittee or licensee from the Government have the opportunity and right to go in and develop gas and sell it and then avoid the compensatory royalty?

A. Yes.

(Testimony of Cecil W. Smith.)

Q. Now, did that situation prevail early in 1934?

A. Yes, it continued for several years.

Q. Do you know why the gas from Government lands in Unit 5, at least those lands that may be involved in this action, was not being sold in 1934?

A. I don't know why it was not being sold, but I know we had made an effort to work out an arrangement to buy it.

Q. With whom? A. Mr. Wight.

Q. You mean John Wight who testified the day before yesterday? [333] A. That is correct.

Q. Were you successful? A. We were not.

Q. Do you recall a meeting in Billings with officials or representatives of the U.S.G.S. concerning this situation? A. Yes, I do.

Q. About when was that?

A. The early part of May, 1934.

Q. Do you know how that meeting came about?

A. As I recall, it came about through discussions which had been held with the U. S. Geological Survey with respect to the formation of a unit plan or some other plan for taking care of this drainage situation, and for arranging for a market for that gas.

Q. Had you requested such a meeting?

A. No, we had not requested such a meeting. As I recall, the meeting was called at the suggestion of the U. S. Geological Survey.

Q. You attended the meeting, did you not?

A. Yes.

(Testimony of Cecil W. Smith.)

Q. And who was present representing the U.S.G.S.?

A. Mr. H. J. Duncan, Supervisor; Mr. Paul Hegwer, who at that time was working on unit plans for the U. S. Geological Survey, and Mr. Perrigo, H. H. Perrigo, the U. S. Geological [334] Survey engineer stationed at Billings, and I believe one other representative of the Survey, I don't recall his name.

Q. And who was there representing the M.D.U. group?

A. Mr. Heskett, Mr. Raymond Hildebrand and I.

Q. And was John Wight present?

A. Mr. John Wight, Mr. George Norbeck and Mr. Huntington, their attorney.

Q. Do you mean Fred G. Huntington, an attorney of Billings?

A. Yes, he represented Mr. Wight and Mr. Norbeck.

Q. How long did that meeting last in Billings?

A. As I recall, it lasted two or three days.

Q. Now, at the meeting, was there discussions with reference to the gas unit agreement, which has been identified here as Exhibit 3, the gas purchase agreement, which has been identified here as Exhibit 4, and the Fidelity operating agreement, which has been identified as Exhibit 2?

A. Yes, those were all discussed and gone over with all parties.

Q. Now, coming first to the gas purchase agree-

(Testimony of Cecil W. Smith.)

ment, was there any limit agreed on the term of those agreements?

Mr. Erickson: To which we object because the agreement is in evidence and speaks for itself.

Mr. Lamey: I think there is one sample here, but there are many. I will withdraw the question and get at it this way—— [335]

Mr. Johnson: On that point may I say this: There is an exhibit introduced, and it was explained that that exhibit was not typical of all situations, that there were some short term agreements.

Mr. Erickson: My objection would stand.

Court: It is the agreement as between these parties.

Mr. Erickson: As to any of the agreements, they are reduced to writing, and there is no explanation why they are not here. I don't care, except I don't want this witness to testify to the terms of the agreement, with this one exception, if it is the purpose of Mr. Lamey to inquire if some are shorter terms than others, I am agreeable to that.

Court: Very well.

Q. On these gas purchase agreements with reference to the plaintiffs here, were they all for the same term of years as far as you recall?

A. Not with respect to all of these plaintiffs. The Cedar Creek Oil and Gas Company gas purchase agreements were made in 1929, and those are for the life of the lease. As to some of these plaintiffs, the term was set at five years. I believe some

(Testimony of Cecil W. Smith.)

of the land involved in the suit, I am not sure, may have been for a longer term.

Q. Were some agreements made at that time with John Wight or his company? A. Yes.

Q. I am talking about shortly after the Billings meeting. A. Yes.

Q. Do you know what the term of those agreements was normally?

A. Those were five year agreements.

Q. Was there a reason for that?

A. The reason given was that they were still working on building a pipeline, hoped to build a pipeline to Minnesota or somewhere else, and they did not want to foreclose their right to produce gas for their own group.

Q. By "they," you mean who?

A. Mr. Wight and his group.

Q. As a result of the meeting in Billings with the U.S.G.S., what was worked out with reference to this compensatory royalty problem?

A. An agreement was reached with Mr. Wight and his group, and it was approved by the supervisor, that prior to the effective date of the unit plan of operation in Unit 5, extra gas would be taken from the wells on the lands belonging to his group sufficient in amount to pay the compensatory royalties which had been assessed by the Government.

Q. And what was that amount, as near as you can remember?

(Testimony of Cecil W. Smith.)

Mr. Erickson: To which we object on the grounds it is incompetent and irrelevant.

Mr. Lamey: I think it came out of the same transaction and consideration that existed at the time for the execution of [337] these agreements, and the overall deal.

Mr. Erickson: The agreements were reduced to writing and recited the consideration.

Mr. Lamey: This is something in addition that occurred at the same time.

Court: Isn't that in effect what you have tried to foreclose the plaintiffs from showing in that regard?

Mr. Lamey: I don't think so, your Honor, this is something outside of any of these written agreements.

Court: Well, then, it has nothing to do with it.

Mr. Lamey: Except it is all entered into at the same time as part of the circumstances under which these agreements were executed, the same transaction.

Mr. Erickson: If it please the Court, in that situation, of course, we would feel we would have to reopen to go into the matter extensively because the agreements are here, and they are in writing, and this matter has not been pleaded.

Court: What is your purpose, what are you going to prove by this?

Mr. Lamey: I am going to prove that coming out of this meeting at Billings, and as part of the transaction—there has been testimony that some-

(Testimony of Cecil W. Smith.)

body had to sign the agreements because M.D.U., or its predecessor, was the only place they could sell the gas. This arrangement was worked out to take care of the compensatory royalty, and the company went ahead and took [338] extra amounts of gas from their lands so they could go ahead and pay up the compensatory royalties and keep the leases in standing, and the Government would then go ahead with the unit plan and its approval. I am offering it, your Honor, on the theory that all transactions arising out of one meeting where an agreement is made are admissible.

Court: Well, yes, if you have to explain something, but you have got your contracts here, and they speak for themselves, don't they?

Mr. Lamey: That was never put in the contract.

Court: Then it is not part of the agreement.

Mr. Lamey: We will withdraw it and go about it this way, I think, perhaps.

Q. Mr. Smith, following the Billings meeting, did you soon thereafter begin taking gas from some of the lands of the plaintiffs? A. Yes, we did.

Q. Was that before the unit agreement was approved by the U.S.G.S.? A. That is correct.

Q. And was it before the gas purchase agreements were actually signed up by the Wight group, if you know?

A. I believe the gas purchase agreements covering the lands on which the wells were connected were executed.

Q. The gas purchase agreements? [339]

(Testimony of Cecil W. Smith.)

A. Yes.

Q. What have you to say as to whether or not that was a greater or less portion of gas than the Wight group would have been entitled to receive under the unit operation plan?

Mr. Erickson: To which I will object on the grounds it is incompetent, irrelevant and immaterial, and for the further reason it is not the best evidence.

The Court: I think your objection is good. I will sustain it. That must appear from the contract itself.

Mr. Lamey: Well, I don't follow it. I think certainly before the unit agreement is finally executed and approved by the Government, we would be entitled to show what these companies did about taking gas over and above what they would have been entitled to under the unit agreement. They started immediately after the Billings meeting to take these extra amounts of gas to take up this compensatory royalty default.

Court: Pending the time——

Mr. Lamey: Before the unit agreement was executed and approved by the U.S.G.S.

Court: Very well, for that purpose.

Mr. Erickson: That obviously is part of a separate agreement. It is not a part of anything here before the Court.

Mr. Lamey: You are assuming it was in writing.

Mr. Erickson: I am assuming that it is a separate transaction before the agreement was made.

(Testimony of Cecil W. Smith.)

Court: It at least applies as to the circumstances when the agreements were entered into, and as to the conditions that then existed. You may proceed.

Mr. Lamey: Read the question.

(Question read back by Reporter.)

A. It was greater.

Q. By how much, if you know?

A. The sum total of about \$25,000.

Mr. Erickson: May it please the Court, I move to strike the last answer as not being fully responsive, and for the reason it isn't material or relevant to this case.

Court: Sustained. I don't see—that is not an answer to the question you asked.

Mr. Lamey: I think my question was—read it.

(Question read back by Reporter.)

Mr. Lamey: By how much was it greater. Now, I don't know whether I am foreclosed by the objection from that, or is the objection to the answer being in dollars, or something else?

Mr. Erickson: I would object no matter what the question for the reason the testimony is irrelevant, it has no place in this case that I can see, and for the further reason that there are obviously records and accounts, that it wouldn't be the best evidence.

Court: It seems to me the figure provided [341] for is determined by the agreements and contracts that were entered into.

Mr. Lamey: I can't, I guess, make myself clear, your Honor. This was not part of a written agree-

(Testimony of Cecil W. Smith.)

ment, gas purchase or unit agreement, except the understanding was that in this interim before the gas purchase or the gas unit agreement was approved by the U.S.G.S., they would go ahead and take some extra gas from these lands over and above what had been agreed upon informally at the meeting in order to take care of compensatory royalties that were delinquent. I want to show the company went ahead and took that, and that then the gas unit agreements were approved.

Court: Why is it important to you to prove that?

Mr. Lamey: I am trying to get the whole transaction. It was part of a very valuable consideration that moved to these plaintiffs of the Wight group, as opposed to the idea they were all against it, or were forced into it. That has been intimated.

Court: He did testify to that effect.

Mr. Erickson: By the statement of counsel, he says he wants to show greater consideration than recited in the contract.

Court: For that purpose I wouldn't accept it. The consideration is recited in the contract.

Mr. Lamey: That's right, I am not attempting to vary the contract. I am attempting to offset some of this testimony I have indicated, and I am certain it is in the record. [342]

Court: For the purpose of explaining the situation that exists as a result of Mr. Wight's testimony with reference to being forced into the situation and that sort of thing, you may proceed.

Mr. Erickson: May I have one further objection

(Testimony of Cecil W. Smith.)

added, that there is no proper foundation for the testimony.

Court: That may be.

Mr. Lamey: I think this witness knows.

Court: You had better lay a foundation with reference to where he got his knowledge, if he was present, and so forth.

Q. Mr. Smith, at that time were you in charge of that part of the operation for this Gas Development Company, predecessor of M.D.U.?

A. I was.

Q. Did you have immediate charge and knowledge of the amount of gas that was taken from these lands of the plaintiffs, particularly the Wight group, to take care of this compensatory royalty situation?

A. I did.

Q. You know that of your own knowledge?

A. That's right.

Q. Now, tell me about how much that was.

Mr. Erickson: To which we object on the ground no proper foundation is laid; obviously records are available, and it is not the best evidence. [343]

Court: It doesn't appear that it was a written contract that was entered into.

Mr. Erickson: He is asking as to amounts of payments and amounts of gas. There are obviously records on those, and this witness is not the best evidence without some showing the records are not available.

Court: I will sustain the objection on that basis.

Q. Now, about the gas unit agreement, what have

(Testimony of Cecil W. Smith.)

you to say as to the first unit that was set up in the Cedar Creek Anticline?

A. Unit number 5 was the first one that was set up.

Q. And was its boundaries discussed at the meeting in Billings? A. Yes, they were.

Q. In 1934? A. Yes.

Q. Who indicated or set the east and west limits?

A. Those were set by the United States Geological Survey and subject to negotiation between the parties. I believe there was considerable discussion at the Billings meeting as to the location, particularly the east boundary of Unit number 5.

Court: Pardon me. With reference to the last objection that was made, in considering it, I think counsel's objection goes to the best evidence rule, and that doesn't apply to a [344] situation of this kind. Because there is a record of a payment made, that doesn't make that record the best evidence. You can testify to it, an individual can testify to it. You may also offer the written record, but the best evidence rule applies only to a document, to a contract, for example, as to what its meaning is, what it contains. If you are trying to prove what the contract contains, then the best evidence is the contract, but when you are proving payments, you can prove it by evidence a dozen different ways, so the objection is overruled in that regard. You may proceed along that line.

Mr. Erickson: I have my objection on the foundation also.

(Testimony of Cecil W. Smith.)

Court: Yes, on the foundation, however, I have sustained your objection.

Q. All right. To get back to the unit agreement, now, what part did the U.S.G.S. have in determining the east and west limits of Unit 5?

A. Those were determined by the U.S. Geological Survey.

Q. And about the limits of the north and south side of Unit 5, who determined those?

A. Those were determined principally by the ownership of lands.

Q. Were those finally approved by U.S.G.S.?

A. Yes, they were.

Q. Was the U.S.G.S. particularly concerned with the north and south boundary, as to where they came? [345]

Mr. Erickson: To which we are going to object on the ground it is incompetent, irrelevant and immaterial, it wouldn't be binding on us in any way.

Court: Overruled.

A. No, the U.S. Geological Survey was not concerned about the north and south boundaries inasmuch as this was the beginning of the program to unitize the entire gas producing area.

Q. And what was the convenience of the parties concerned, including the plaintiffs and their predecessors, that dictated the north and south boundaries as finally established in Unit 5?

A. Well, the boundaries in Unit 5, as I mentioned before, were established principally by ownership, and Unit number 5 contained practically all

(Testimony of Cecil W. Smith.)

of the lands that Mr. Wight and his group owned. They had a few scattered pieces in other units, but this was the unit they were particularly interested in.

Q. And do I understand correctly that all of the land shown within Unit 5 did become a part of this gas unit operation? A. Yes, they did.

Q. Now, the exhibits show a number of other units up and down the anticline, I believe from 1 to 8, is that correct? A. 1 to 8-A now.

Q. And will you tell us in general about when they were set up and what they pertain to, that is, whether oil or gas or both? [346]

A. Unit number 5 was approved in, I believe it was about the first of November; it was approved prior to the first of November, 1934, when it became effective. Units 1, 2, 3, and 4 were approved at various times up until about 1936, I believe, or 1937. Those were all gas producing units with the provision that the owner further agreed to join other unit plans.

Mr. Erickson: To which we are going to object and move that the portion of the answer now be stricken as to further unitization.

Mr. Lamey: That is all right, I have no objection after the first sentence. Read back the first part of it.

Court: Very well, it may be stricken.

(Answer read back by Reporter.)

Mr. Erickson: My objection went to the language starting "with the further provision".

(Testimony of Cecil W. Smith.)

Court: That has been agreed to be stricken.

Q. All right, proceed.

A. Unit number 6 and Unit number 7 were approved, I believe, subsequent to 1936, probably in 1937. Units number 8-A and 8-B were originally Unit number 8, and Unit number 8 was originally formed as an oil unit and was subsequently displaced by Units 8-A and 8-B. Units 8-A and 8-B are oil and gas units both.

Q. Were all of those units approved by U.S.G.S.?

A. They were.

Q. At your Billings meeting was the Fidelity operating [347] agreement discussed and considered?

A. It was, it was gone over paragraph by paragraph.

Q. Was that in the presence of the U.S.G.S. men as well as the others? A. It was.

Q. Was Mr. Wight there?

A. Mr. Wight, Mr. Norbeck and Mr. Huntington.

Q. At the meeting on it and at its conclusion, were any arrangements made with Mr. Wight's group about getting the gas unit agreement and the Fidelity operating agreement executed by the land owners within Unit 5? A. Yes.

Q. What was the arrangement?

A. The arrangement was Mr. Wight would secure the execution of all of these agreements by the people that he represented.

Q. And did he carry out that arrangement?

(Testimony of Cecil W. Smith.)

A. He did.

Q. Now, what have you to say as to other agreements similar to the Fidelity operating agreement on lands up and down the Cedar Creek Anticline, do you have others outside of Unit 5?

A. Yes, we do.

Q. Can you give us a general idea of where they extend and the amount?

A. The Fidelity operating agreements were obtained on about 90 percent of the acreage on the structure, I would say, from [348] Unit number 1, to and including Units 8-A and 8-B.

Mr. Lamey: Perhaps I didn't follow, I am sorry. Will you read the answer?

(Answer read back by Reporter.)

Q. From Units 1, 2——

A. From 1 to 8-A and 8-B.

Q. Now, what is the situation as to any M.D.U. lands in the Cedar Creek Anticline being under the same Fidelity operating agreement?

A. The Montana-Dakota Utilities company executed the same agreement with the Fidelity Gas Company as all of the other parties executed.

Q. Have you continued the operation under the gas unit agreement in Unit 5 over this period of years?

A. Yes, it has been operated ever since November 1, 1934, under the unit agreement.

Mr. Erickson: I am sorry, I didn't get the question when Mr. Lamey asked it, so I didn't get a chance to object. Read the question, please?

(Testimony of Cecil W. Smith.)

(Question read back by Reporter.)

Mr. Erickson: No objection.

Q. And during the time that the gas unit agreement had been in operation, who had been taking the gas produced therefrom?

A. Montana-Dakota Utilities Company.

Q. And is that still the case? [349]

A. That is still the case.

Q. Now, will you tell us about what the situation was with reference to wells in Unit 5 at the time the gas unit agreement was approved, and then what has been done since by your company under the unit agreement in the way of development?

A. At the time the gas unit was formed, I believe that there were about six or seven wells in that unit from which we were producing gas under gas purchase contracts, and I believe there were about six, or possibly eight wells in that unit that had been drilled by Mr. Wight and his associates from which gas had not been produced. I don't recall the numbers exactly, it is 20 years ago.

Q. Were those wells then taken over as part of the unit operation of Unit 5?

A. Yes, they all were.

Q. And from what sand was the gas being produced from those wells?

A. From the Judith River sands.

Q. Has there since been production from any other sands?

A. Yes, there has been production since from the Eagle sands.

(Testimony of Cecil W. Smith.)

Q. Where is that located with reference to the Judith River sands?

A. It is about 600 feet deeper than the Judith River sands.

Q. Do I understand correctly that the Eagle sands are not under the same unit operation or unit agreement, is that right? [350]

A. The Eagle Sands are not unitized.

Q. There has never been a unit set up on those sands and the production therefrom?

A. That's correct—I would modify that statement. There has not been a participating area set up.

Q. Do you produce some gas from those Eagle sands?

A. Some gas from some of those Eagle sand wells.

Q. Now, there was some testimony yesterday about the Cedar Creek agreements. What have you to say as to when the gas unit agreement and Fidelity operating agreement were executed by Cedar Creek as related to other agreements of like character in Unit 5?

A. I believe those agreements were executed later than the other agreements in Unit number 5 by some four or five or six months.

Q. Did you ever have occasion to go to Faribault, Minnesota, to see Mr. Jirik in connection with the execution of those two agreements?

A. Yes, I went down to Faribault and had a meeting with Mr. Jirik and, I believe, his directors,

(Testimony of Cecil W. Smith.)

at the time we were negotiating the unit agreement and the deep test agreement.

Q. You heard Mr. DeWolf's testimony this morning with reference to his geological work in the Cedar Creek area, did you not? A. Yes, I did.

Q. On behalf of what company did you employ Mr. DeWolf to carry on his geological work, do you recall?

A. Well, I believe that it was on behalf of the Minnesota Northern Power Company that we made his employment.

Q. Was that another one of the predecessor companies?

A. That was the predecessor company of Montana-Dakota Utilities Company.

Q. At what cost to your company was the geological and geophysical work done which led to the development under the Fidelity agreement which has been described here?

A. It was approximately \$25,000.

Q. Now, were you in charge at the field when N.P. well No. 1 was commenced on or about August, 1935? A. Yes, I was.

Q. I think that has been designated by other witnesses on the map, and is it correct to say generally that that was in the Little Beaver area?

A. That is correct.

Q. What was the final depth of that N.P. No. 1?

A. 8186 feet.

Q. Was it put down all as part of one continuous operation, or separate?

(Testimony of Cecil W. Smith.)

A. No, there were two separate operations. The discovery of oil was first made at a depth, as I recall, of around 6740 feet. The casing was set at that horizon, and a series of [352] tests made to see if it were commercial. The well was acidized to try to increase production, and difficulties with water were encountered, and then drilling was subsequently continued and carried on from that depth until a depth of 8186 was reached, and another producing zone was encountered. Another string of casing was set in that well and production tests were carried on for a considerable period of time to determine whether that horizon could be made into a commercial producer.

Q. What was the overall cost of that N.P. No. 1 well? A. \$212,251.01.

Q. Now, when was this work done with reference to the commencement of the well, which I understand was about September, 1935?

A. That well was spudded in September 1, 1935. Preliminary work was done, work prior to that time, the installation of drilling rig, drilling equipment, building of roads, erection of equipment, that began during August, 1935.

Q. And when did you finally complete your work so far as setting casing was concerned at the deepest horizon?

A. The tubing was run on that well, pumping equipment was installed, and the drilling equipment was moved off on October 10, 1936.

(Testimony of Cecil W. Smith.)

Q. Were any tanks erected to receive oil that was produced? A. Yes. [353]

Q. How many, and tell me something of the character?

A. As I recall, there were three or four 250 barrel tanks erected at that time when pumping equipment was installed.

Q. Now, did you commence the Warren well in Unit 5 and the Smith well No. 1 about the same time?

A. The Warren well in Unit 5 was spudded in on October 22, 1936; the Smith well in Unit 8, at that time, was spudded in on October 25, 1936.

Q. How deep did you carry the Warren well?

A. 7360 feet.

Q. Was that a continuous operation, or one or two?

A. That was carried on in one continuous drilling operation.

Q. And what did you encounter in that well in the way of oil shows or production?

A. We encountered in that well at this approximate depth the same horizon that we had encountered in the N.P. well at 6740 feet, and we found that the horizon at the Warren well contained salt water and no oil.

Q. What did that well cost your company?

Mr. Erickson: We are going to object, your Honor, as being incompetent, irrelevant and immaterial. We will stipulate the well was drilled pursuant to the contract.

(Testimony of Cecil W. Smith.)

Court: Overruled. I think the Court will take a 10-minute recess.

(10-minute recess.) [354]

Mr. Lamey: What was the last question?

(Question read back by Reporter.)

A. There was no casing installed in the Warren well except surface casing. The cost was \$88,063.03.

Q. To what depth was the Smith No. 1 well drilled?

A. That was drilled to a total depth of 6811 feet.

Q. Was casing set in that well? A. It was.

Q. How many shows of oil did you discover or encounter in that well?

A. We encountered a saturated producing horizon at about 6780 feet, as I recall it. Casing was set at that depth and tests were made of that well over a considerable period of time.

Q. How long did your tests continue in that well?

A. My recollection is that drilling equipment was kept on that well, and swabbing tests were made. It was deepened to a certain extent down to the final depth after the original producing horizon was encountered. Water was also found in that well, and a series of plugging operations was carried on. The testing was carried on until August 17, 1937. Pumping tests and pumping operations were continued for, I believe, a year after that, until July or August, 1938.

Q. What about pumping tests on the N.P. No. 1 during that same period?

(Testimony of Cecil W. Smith.)

A. Pumping equipment was moved off of the Northern Pacific [355] well in March or April, I believe, of 1937. It was installed in the Smith well, and the Northern Pacific well was allowed to flow naturally as long as pumping tests were carried on in the field, which I believe was up to about August, 1938.

Q. Was anything more done on the N.P. No. 1?

A. No, there was nothing further done.

Q. What was the nature or type of oil that you encountered in these wells?

A. Oh, it was a paraffin—a mixed paraffin asphalt base, as I recall it, about a 32 gravity oil, which was a rather low grade oil at the time. It had, as I recall it, on distillation test, about 19 to 21 per cent gasoline.

Q. What effort did you make to sell the oil?

A. There wasn't any market for the oil at the time. The pumping operations were continued until the tanks were filled, and then production tests stopped.

Q. Was there water being produced with the oil?

A. The N.P. well flowed naturally about 12 or 15 barrels a day, and there was no water in that well. The Smith well produced large quantities of water. As I recall, the average production of oil per day was about 35 to 40 barrels, along with approximately 250 barrels of water per day on pumping.

Q. Did you attempt to use some of that oil in

(Testimony of Cecil W. Smith.)

your operation in Glendive in connection with your plant?

Mr. Erickson: To which we are going to object on the [356] grounds it is immaterial and irrelevant.

Court: Overruled.

A. We conducted some tests of that oil for the use as fuel in our electric generating plant at Miles City. At that time it was necessary to establish prices. It was agreed with the Northern Pacific and U.S.G.S. that 60 cents a barrel was a fair price for that oil at that time.

Q. Was it economically feasible or possible to produce those wells under the conditions you have related? A. No, it was not.

Q. Were either of the wells you drilled there commercial wells?

A. That was our final decision that they were not commercial.

Q. I don't believe I asked you to give the cost of the Smith well No. 1. I would like to have you do that now.

A. The final cost on the Smith No. 1 well was \$125,615.88.

Q. Now, this morning Mr. Davies testified about some negotiations that began in 1935 with Fidelity Gas Company and the other M.D.U. group with reference to some arrangement or interest or joint operation in these lands in the Cedar Creek Anticline. Did you know Mr. Davies at the time of these negotiations? A. Yes.

(Testimony of Cecil W. Smith.)

Q. At the time, what was your position with Fidelity and the predecessor company—pardon me, by that time I guess it was [357] M.D.U., was it not? A. By that time it was M.D.U.

Q. You were what, vice president?

A. No, I was not vice president until 1944. I had charge of the field operations for M.D.U. at that time.

Q. Were you in the field a good deal during the drilling and testing of these three wells about which you have been questioned just recently?

A. Yes, I was in the field a large part of the time.

Q. And about when did your negotiations commence with the California Company?

A. I believe it was about the time that the Northern Pacific well was started, about early in September, 1935.

Q. You heard Mr. Davies testify, did you not, as to the various stages of negotiation? A. I did.

Q. Is that substantially correct as you remember that? A. That is correct.

Q. Now, during 1937, what do you recall with reference to these negotiations with Mr. Davies or other representatives of the California Company?

Mr. Erickson: At this time we wish to object to the question and move to strike the last testimony of Mr. Smith with reference to these negotiations for the reason that the testimony already shows negotiations resulted in no agreement. [358] If

(Testimony of Cecil W. Smith.)

there had been an agreement of any kind, it would not have been within the terms of this contract. Anything concerning those negotiations are outside the issues of this case entirely. An examination of the contract shows that repeatedly the Fidelity Gas Company agrees to do certain things. There is a provision in the contract at the very end under which the contract may be assigned by Fidelity Gas, but repeatedly in the contract the obligation is assumed by Fidelity Gas to do various things. There are extensive provisions as to the manner of charging costs and what are proper expenses, and various items in here that show conclusively that Fidelity was to be the operator under this contract. It had no right to delegate that authority. It is a purely personal contract insofar as this phase is concerned, it is non-delegable insofar as this was concerned because there was no assignment here. This objection goes to evidence that will be offered concerning the so-called Carter well and the Husky well, and it is basic to our position.

Mr. Lamey: It is our position on this immediate testimony that it offsets and refutes the testimony of Jirik and Smith and several others that during 1937 and early in 1938, they were told by Mr. Heskett and Mr. Smith that they were all through out there. Now, I want to show where they actually went out and were actually negotiating to get somebody in to drill a well. I think it refutes and overcomes, or at least [359] conflicts with that.

Mr. Erickson: As far as the matter of abandon-

(Testimony of Cecil W. Smith.)

ment is concerned, I would have no objection to the testimony.

Mr. Lamey: One at a time, but when we come to that, we don't accept counsel's viewpoint that the only way Fidelity could do something down there was to go out and do it themselves.

Court: We will overrule the objection at this time for the purpose of refuting the evidence of abandonment.

Mr. Erickson: I wouldn't want to restrict myself as to that. I believe abandonment could occur no matter what the intention was if they didn't do the things required.

Court: That is your position.

Mr. Erickson: Yes. Very well, proceed.

Mr. Lamey: I don't know if the question was answered.

(Question read back by Reporter.)

A. These negotiations were carried on more or less continuously during that period of time. I believe Mr. Davies testified that they were very active in North Dakota during that period, and he made frequent trips to Minneapolis, and the terms of the agreement or possible agreement were discussed from time to time and efforts made to work out the final agreement.

Q. There has been introduced in evidence a letter Mr. Davies signed on behalf of his company on January 9, 1939, to the [360] effect that the Board of Directors had considered the matter and decided not to go ahead. Up until that time had you any

(Testimony of Cecil W. Smith.)

information and belief that the California Company was not ready to go ahead on an agreement if you could arrive at the final terms?

A. No, we had no indication that they would not go ahead with it.

Q. Mr. Smith, in 1940, did you carry on any negotiations with the Carter Oil Company with reference to these lands involved in the Cedar Creek Anticline, and particularly those under the Fidelity operating agreement? A. Yes, we did.

Q. And that also included lands in Unit 5?

A. It did.

Q. And those of the plaintiffs in this case?

A. It did.

Q. Do you know about when those negotiations began?

A. Oh, there were preliminary conversations in connection with those negotiations extending back into the latter part of 1939. Carter Oil Company were becoming active up in that area, and Mr. Nelson Ruth——

Q. Did those negotiations result in entering into a contract? A. Yes, they did.

Q. And pursuant thereto was a well drilled by Carter in the Cedar Creek Anticline? [361]

A. That is correct.

Q. I don't believe that that has been identified on the map. Will you point it out on Exhibit 1-A and tell us the legend or designation that appears on the map?

A. That well is shown in Unit 8-B in Section

(Testimony of Cecil W. Smith.)

19, Township 4 North, Range 62 East. The map designation is "Carter—N.P. No. 1."

Q. Will you tell me when that well was commenced?

A. That well was spudded in May 12, 1941, and was finally plugged and abandoned on January 8, 1942.

Q. Do you know the depth to which it was drilled?

A. Well, roughly about 91 or 92 hundred feet.

Q. There was some reference made in the testimony this morning, I believe, that that well was drilled to granite, is that correct?

A. That is correct.

Mr. Erickson: May I have a continuing objection with relation to all of the testimony on the Carter well and Husky well on the grounds heretofore stated, it is immaterial and irrelevant, that it is outside the issues of the case, and I do make that objection to the testimony now.

Court: It is being offered with reference to this question of abandonment, is it not?

Mr. Lamey: Abandonment. I also propose to produce these agreements we have on this well and show that it is a well [362] being drilled through the efforts and in cooperation with Fidelity Gas Company. I think it goes to abandonment, and perhaps any other question that may arise under the issues.

Court: I don't know there is any other question to which it can go offhand, but it seems to me it

(Testimony of Cecil W. Smith.)

certainly is relevant to the question of abandonment, if activity any place beside Unit 5 can be considered. That is something you are going to have to argue in your briefs.

Mr. Erickson: The only thing I am interested in is that I not get here in a position where I let evidence go in without objection.

Court: While I haven't specifically said I will reserve ruling on these matters, the fact of it is I will reserve ruling on these objections so you can argue them to me in your brief. In other words, your position, Judge Erickson, is that any activity done on Unit 1 doesn't constitute evidence of non-abandonment of Unit 5?

Mr. Erickson: That is correct.

Court: Or upon Unit 8 or some other place, and while I am not ruling on that at this time, you see, I want you to argue that matter to me later, so the effect of my rulings is actually I will reserve ruling on the objections and let in the evidence, then you argue the matter later.

Mr. Erickson: That is the reason I asked for a continuing objection. I didn't expect a ruling. I want to be sure [363] I wasn't in the position of saying all of the testimony relative to Husky and Carter could be let in.

Court: I will understand that, and you will be given an opportunity to argue any and all of these questions with reference to the admissibility of evidence in your briefs, and the decision can then be made.

(Testimony of Cecil W. Smith.)

Mr. Erickson: May I add one point to the objection? Not only do we take the position that drilling done there has nothing to do with Unit 5, but we also take the position it is not drilling in compliance with the agreement.

Court: Yes, I understand that, and you may argue those points. Proceed.

Q. Were you in close touch with that well during the time it was being drilled?

A. Yes, I got daily reports on progress.

Q. And do you know what was encountered in that well in the way of oil shows, if any?

A. Oil shows were encountered in that well in about three different zones, I believe.

Q. Was any oil ever produced from the well?

A. No, there was not.

Q. Was it commercial?

A. The well was drilled during the war——

Mr. Erickson: May I object to the answer being obviously not responsive. [364]

Q. I asked if the well was commercial.

A. The well was not commercial.

Q. Explain, if you will, what the situation was with reference to oil, whether it was just shows or pumping of oil or what?

A. They had two or three good shows of oil, and I believe that there was a test made, on one of the drill stem tests, it was estimated they had about 200 barrels a day production, but due to the shortage of materials, the casing was only cemented with 100 sacks of cement, so when they started to perforate,

(Testimony of Cecil W. Smith.)

large quantities of water were encountered. It was impossible to shut it off properly. When the water was shut off, oil was shut off as well, so there never was a complete test made of any horizons that were penetrated.

Q. Was the well finally plugged?

A. It was finally plugged and abandoned.

Q. When was that?

A. It was plugged and abandoned on January 8, 1942.

Q. Do you know the cost of that well? From your experience in drilling other wells and general experience with reference to drilling, what is your opinion as to the approximate cost of that well?

Mr. Erickson: To which we object on the ground it is incompetent, irrelevant and immaterial.

Court: Sustained. [365]

Mr. Lamey: May it please the Court, at this time we offer to prove by the witness on the stand that the cost of this well was approximately \$148,000.

Mr. Erickson: We object on the same ground.

Court: Well, he can prove that, it is quite all right with me, but not in the method you have asked him. You haven't laid any foundation for him to give an approximation or give an opinion, and furthermore, his opinion, there is no need for asking his opinion. It is a fact how much the well cost.

Mr. Lamey: Well, we have the facts. I agree perhaps I should lay more foundation. We know

(Testimony of Cecil W. Smith.)

the cost of the well through figures of the Carter Company.

Court: Well, all you have to do is call Carter Company in and prove it.

Mr. Lamey: They are not available.

Court: Well, you can't prove it this way.

Mr. Lamey: I think I can get his opinion of the cost of the well.

Court: I doubt it. You can go ahead and try, but lay a foundation. Obviously, you see, he tells us one well cost \$81,000 and another well cost \$150,000. Whatever it is, there is a great variation between the cost of wells.

Mr. Lamey: That's right, but the variation comes in whether you have casing in the well or not. [366]

Court: It may come from other reasons too, I suppose. You can go ahead if you want to, but the best way to do it and the proper way to do is call Carter in.

Mr. Lamey: I understand that, your Honor.

Q. What was the situation with reference to drilling from 1942 and during the duration of World War II?

Mr. Erickson: To which we will object on the grounds it is incompetent, irrelevant and immaterial.

Court: What is the question.

Mr. Lamey: I want to show——

Court: I didn't hear the question.

(Testimony of Cecil W. Smith.)

Mr. Lamey: The question was the situation during the period from 1942 during World War II.

Court: With reference to the ability of people to drill and operate?

Mr. Lamey: Yes.

Court: The objection is overruled.

Q. Do you know? A. Yes, I do.

Court: All of this, you understand, it is only material if the Court finally decides against you on the objections that you have continuing through here.

Mr. Erickson: On this particular matter, your Honor, I had in mind there is a provision in the contract for act of God and so on relieving them of obligations. There is no [367] foundation here to establish——

Court: This is still going to the question of abandonment, what the conditions were with reference to which they were operating.

Mr. Erickson: We may further note there is no pleading of excuse by reason of war conditions for failure to perform.

Mr. Lamey: Your Honor and counsel, I am sure that that is what the Court has in mind. It would save a lot of time, and I would like to expedite the matter too. Under the rules of evidence, I understand if the evidence is clearly inadmissible in a trial before the Court, the Court rules it out; otherwise, the rule under the Federal practice is to allow the parties to go ahead and put in the evidence and get a complete record of it, and then brief it and so

(Testimony of Cecil W. Smith.)

on, and I am sure we will save a lot of time if we can proceed on that. I don't want to offer evidence I think is clearly inadmissible. I believe under our theory the evidence is admissible.

Court: Counsel also wants to be sure that his record is clear and that he can rely upon it.

Mr. Lamey: I think he has objected to it and the Court has said he can brief it.

Mr. Erickson: The position I take is this: All day today I have refrained from objecting except on matters I think are material. Certainly I haven't objected when counsel led a witness because I know we are not being damaged by that in [368] any respect. However, I do call the Court's attention, and counsel's also that in our presentation of our case, objections were made on these matters and a good deal of evidence was excluded. I couldn't go along with counsel's suggestion that I sit back and permit evidence to go in that I think is clearly inadmissible, even in a preliminary way.

Court: I will reserve ruling on the objection; you may proceed with the evidence.

Q. Mr. Smith, in what capacity did you serve that gave you a knowledge with reference to shortages in pipe and cement and that sort of thing necessary in drilling of wells during the war period?

A. I was responsible for trying to get pipe and well casing and equipment and that sort of thing for our operations, and it was difficult to get pipe unless you could show an urgent need for the production of gas or for the production of oil. Now, in

(Testimony of Cecil W. Smith.)

this particular area, there was no market for oil, and it was difficult to persuade any major oil company to come up and drill in an area, and use steel for drilling wild cat wells in an area where there was no market for oil. With the scarcity of steel, they wanted to use it in fields where they had production and marketing facilities available.

Q. Was there any drilling for oil or deep tests in the Cedar Creek Anticline during the period from 1942 to 1948?

A. No, there was not. [369]

Q. Prior to 1948, I will say immediately prior, did you carry on any negotiations with the J. E. Manning Company looking toward the resumption of deep drilling in Cedar Creek?

A. Yes, we did.

Q. About when was that?

A. They were beginning in, I think, the latter part of 1947, extending over a considerable period of time, one or two years.

Q. Who was J. E. Manning?

A. J. E. Manning was a gentleman from Cody who was a drilling contractor, and who conducted negotiations with several different people whom he thought might be interested in drilling a well on the Cedar Creek Anticline.

Q. Developing out of those negotiations, did you have negotiations which led to a contract and the drilling of a well by Husky Oil Company of Cody, Wyoming?

A. Yes, we did.

Q. And when was that contract—strike that out.

(Testimony of Cecil W. Smith.)

When were your negotiations commenced, as well as you can remember?

A. I believe they were commenced in 1948, and the contract was executed, I believe, in the early part of 1949. I would have to refer to the contract itself for the exact date.

Q. Would your file in connection with that Husky well help you refresh your memory as to some of these dates I am inquiring about? [370]

A. I think it would.

Court: Pardon me, just a minute. Judge Erickson, while I think of it, with reference to these objections and so forth, I recall I excluded some of your evidence in your case. I believe that at the time I suggested you brief that, and if I find my position is wrong, I would reopen the case.

Mr. Erickson: I hope the Court didn't misunderstand me. I wasn't suggesting that the Court was not treating me fairly at all.

Court: I want to be sure you understand me. At the time it appeared it wasn't admissible at all. If you will brief the matter and show me, I will reopen the matter for you.

Mr. Erickson: I wasn't referring to anything else.

Q. Mr. Smith, I would ask you to refer to a communication of September 27, 1948, and another of October 13, 1948, and see if they will refresh your memory as to when your negotiations with Husky began?

(Testimony of Cecil W. Smith.)

A. There is a letter dated September 17, 1948—

Q. I am merely asking you to refer to it and then tell me when your negotiations with Husky began, as near as you can approximate?

A. They began about that time, about September, 1948.

Q. Did they subsequently lead to an agreement?

A. They did.

Q. And what was the date of your agreement with Husky? [371]

A. November 20, 1948.

Q. And as a result of that agreement, was a well drilled in the Little Beaver area?

A. Yes, it was.

Q. And where?

A. It was drilled in Section 7, Township 4 North, Range 62 East in Unit 8-B.

Q. And what were the results of the drilling of that well?

A. That well encountered oil and water in much the same manner as the Smith well encountered like production and like water, the Smith well being the third well drilled by our company.

Q. When was the well commenced?

A. May 13, 1949.

Q. And when was it completed?

A. The rig was moved off of that well on July 29, 1949. Tubing was installed and pumping equipment was installed, and it was pumped for some little time after that.

Q. Was there any production from that well?

(Testimony of Cecil W. Smith.)

A. There was a small amount of production. They had installed tanks and had pumped a quantity of oil there in order to test the well.

Q. What have you to say as to whether or not it was a commercial or non-commercial well?

A. It was not a commercial well. [372]

Q. And in connection with the drilling of that well, did you receive statements of the costs of the well from Husky? A. Yes.

Q. And were those furnished to you at the time the well was being drilled for your approval and information? A. Yes.

Q. Do you have those? A. Yes.

Mr. Lamey: I would say to the counsel and Court, we can produce those, or we have them tabulated and he can give the tabulated amount.

Mr. Erickson: I would like to see them.

Q. Now, Mr. Smith, what was the total cost of that Husky well? A. \$165,964.32.

Q. Now, following the completion of that well by Husky, did they do any further development in that Cedar Creek Anticline?

A. No, they did not.

Q. When did you begin negotiations with the Shell Oil Company which led to the agreement which has been introduced in evidence here as Exhibit No. 5?

A. I believe it was about July or August, 1950.

Q. Have you and your company at all times cooperated with Shell, Husky and Carter in their operations that you have described? [373] A. Yes.

(Testimony of Cecil W. Smith.)

Q. You know Mr. Smith and Haney, of course, who testified here as witnesses earlier in the case?

A. I do.

Q. Did you have occasion to visit with them and have some business transactions in California in the month of May, 1952?

A. I did.

Q. Where did your meeting or meetings take place?

A. I had two meetings at which Mr. Haney was present. Those both occurred at his home in La-Habre near Whittier, California. At those meetings, Mr. H. C. Smith was also present.

Q. And what have you to say as to whether or not Mr. Armin Johnson was present?

A. Mr. Armin Johnson was present at both of them.

Q. Was he acting as your attorney at that time?

A. He was.

Q. Was there any other meeting held with Mr. Smith while you were in California on this same occasion?

A. Yes.

Q. When and where was that held.

A. There was an additional meeting held in the office of Mr. Smith's attorney in Los Angeles. Mr. Johnson was present at that meeting.

Q. I take it Mr. Haney was not present?

A. I don't believe Mr. Haney was present at that meeting. [374]

Q. Now, what was the purpose of the meeting, or the meetings, rather?

A. Well, the meeting was for two purposes. Mr.

(Testimony of Cecil W. Smith.)

Haney had telephoned to me sometime previously and asked about the agreements for deep drilling on acreage that he had an interest in, and I had sent to him a copy of the Fidelity Gas Company agreement.

Q. About when was that?

A. Oh, I think that was sometime during April in 1952.

Q. And in the course of your meetings in California, particularly the two in Mr. Haney's home, was any discussion had with reference to the Fidelity operating agreement, Exhibit 2?

A. Yes, that was discussed, and the method of operation under that agreement was discussed, the interest that they held under that agreement was discussed with them.

Q. Did you also at that time discuss the purchase of certain gas rights in their land?

A. Yes, we discussed with them the purchase of their remaining gas and their interest in the wells in Unit No. 5.

Q. And those discussions and the subsequent conference at the lawyer's office led to those purchase agreements that have been introduced in evidence here?

A. They did.

Q. Now, at that time, did you discuss with them the progress of the Shell development that was then going on in the Cedar [375] Creek Anticline?

A. Yes, we discussed that quite fully. I had a map of the anticline and a map showing their interests, and I had a copy of the Shell operating

(Testimony of Cecil W. Smith.)

agreement, all of which we went over with them quite thoroughly and discussed with them in the two meetings.

Q. Did you at any time during these meetings or any other time advise Mr. H. C. Smith that M.D.U. and Fidelity had no interest in the deep horizons in these lands in which they were interested in Unit 5? A. I certainly did not.

Court: Pardon me, counsel, I think we will take a short recess until 10 minutes after four.

(10-minute recess.)

Mr. Lamey: May it please the Court, during the recess, counsel has asked us to produce the agreements to which reference has been made on the Carter and Husky wells, and we have done that, and I believe counsel indicated he would like to have them put in the record. We have no objection.

Mr. Erickson: In offering them, we have in mind our continuing objection, but as long as reference has been made to them, I would like to have them in.

Court: I think that is proper. I would like to have them in so—you see, I am going to have to finally decide whether any of these agreements they have had with Husky or [376] Carter or anyone else constitutes proceeding under their agreement with the Cedar Creek. That is one of the main questions we have to decide.

Mr. Erickson: That is our thought of what the case will come down to.

Mr. Lamey: I think, then, counsel, perhaps I can just dictate a stipulation that we now offer

(Testimony of Cecil W. Smith.)

under stipulation Exhibit 43, being a contract dated June 6, 1940, between Fidelity Gas and Carter Oil Company, and Exhibit 44, being an agreement between the same companies, dated November 27, 1940; Exhibit 45, which consists of a telegram from Carter Oil Company to Fidelity Gas Company, dated December 31, 1941, and a letter between the same companies dated December 30, 1941, which has to do with the terms of the agreement.

Mr. Erickson: That is agreeable to the plaintiffs.

Court: Very well.

(Defendants' Exhibits 43, 44 and 45 admitted in evidence.)

Mr. Lamey: May it also be stipulated that there be received in evidence Defendants' Exhibit 46, which is an agreement dated November 20, 1948, between Fidelity Gas Company and Montana-Dakota Utilities Company and Husky Refining Company; also a letter agreement which has been marked Exhibit 47, dated November 13, 1948, between these—yes, dated November 13, 1948, between these companies, and Exhibit 48, a letter agreement between the same companies dated May 22, 1950? [377]

Mr. Erickson: That is agreeable to the plaintiffs.

Court: Very well.

(Defendants' Exhibits 46, 47 and 48 admitted in evidence.)

Q. Mr. Smith, how long have you known John Wight, who testified for the plaintiffs here?

A. I believe since about 1927.

(Testimony of Cecil W. Smith.)

Q. Mr. Wight testified that sometime in 1937, or possibly 1938, at Minneapolis, Minnesota, he talked to you with reference to the Warren well particularly, and at this time and place, according to his testimony, you stated to him that your companies were all through with oil operations in the Cedar Creek Anticline, and particularly Unit 5, and I will ask you now whether or not you ever made a statement to that effect to Mr. Wight at the times indicated or any other time, a statement to that effect? A. I certainly did not.

Q. Has Mr. Wight ever discussed with you the deepening of the Warren well? A. He has not.

Q. What was the situation during 1937 and 1938 between your company and Mr. Wight, with particular reference to litigation and suits that he then had pending against your company?

A. I believe that he had four suits pending against our company.

Q. Was one of those a proceeding in the Department of Interior [378] entitled "Capital Gas and others vs. Montana-Dakota Utilities Company?"

A. It was.

Q. And also during that period was there an action of Montana Eastern Pipe Line Company vs. Montana-Dakota Utilities Company in the United States District Court of Montana, the Billings Division, before Judge Pray? A. It was.

Q. Do you know when that particular case was tried?

(Testimony of Cecil W. Smith.)

A. I believe that was tried, I believe, in March, 1937.

Q. And as part of this litigation to which you refer, was there a case, Montana Eastern Pipe Line vs. Minnesota Northern Power Company, Montana-Dakota Utilities Company, and Gas Development Company in the United States District Court in Minnesota? A. There was.

Q. And was there also a case at this same time of the Montana Eastern Pipe Line Company, Capital Gas Corporation, John Wight and E. A. Wight vs. Montana-Dakota Utilities Company and the Gas Development Company in the United States District Court of Montana, Billings Division?

A. There was.

Q. Do you know about when that case before Judge Pray was decided?

A. It was decided in 1938; I am not sure of the month. [379]

Q. Now, during the period, those years, 1937 and 1938, when this litigation was pending, was John Wight visiting your office in Minneapolis?

A. I don't have any recollection of his having been in there at all during that period.

Q. What was the general feeling between you and Mr. Wight arising out of this litigation?

A. Well, it wasn't a very friendly feeling, I would say.

Q. How long have you known Mr. Jirik?

A. I have known Mr. Jirik since, I believe, early in 1929.

(Testimony of Cecil W. Smith.)

Q. It was about that time that you began purchasing gas from his company, the Cedar Creek Oil and Gas Company, was it not?

A. Yes, I think I met Mr. Jirik shortly before we worked these contracts out.

Q. Did you hear Mr. Jirik testify yesterday about conversations he had with you concerning the Warren well? A. I did.

Q. And also concerning statements that he said were made by you with reference to abandoning the operations for oil in the Cedar Creek Anticline?

A. I did.

Q. As I recall, Mr. Jirik fixed two dates, or approximate dates, on which he talked to you, in the fall of 1937, and shortly after January 1, 1938, and I will ask you whether at [380] that time, or at any other time, you ever told Mr. Jirik that your companies, the Fidelity and Montana-Dakota Utilities Company, or any other companies, were abandoning their oil rights in the Cedar Creek Anticline, or any part thereof? Did you ever make any such statement? A. I certainly did not.

Q. Did you at those times or any other time tell Mr. Jirik your companies were abandoning their deep horizon drilling program in Montana?

A. I never told him we were discontinuing our activities in connection with deep drilling. As a matter of fact, he came into the office——

Mr. Erickson: May I at this point move to strike the answer as being not responsive.

(Testimony of Cecil W. Smith.)

Mr. Lamey: Maybe from "As a matter of fact" on.

Mr. Erickson: No, right at the start.

Court: Read the question and answer, Mr. Parker.

(Question and answer read back by Reporter.)

Mr. Erickson: Withdraw the objection.

Mr. Lamey: You may strike from "As a matter of fact" on, and I will go on with another question.

Court: Very well.

Q. Did you, on or about the month of February, 1938, have any conversation in your office with Mr. George Seivers and Mr. Thomas Jirik pertaining to the Warren well? [381]

A. No, I did not.

Q. It was testified, as I recall, by Seivers and perhaps Mr. Jirik that at the time just mentioned that you made a statement to the effect that your companies were abandoning their oil program in Montana. Did you, at the time indicated, or at any other time, make such statements to George Seivers in the presence of Mr. Jirik, or to him alone?

A. I did not.

Q. Did you ever make such a statement to Mr. Jirik? A. I did not.

Q. Now, there was some reference made by Mr. Seivers, as I recall, in attempting to fix a date, that there was some occasion to speak about the drilling of wells in the Eagle sands. Now, do you recall whether you ever had a conversation with

(Testimony of Cecil W. Smith.)

Mr. Seivers, either with or without Mr. Jirik, where there was some discussions of the Eagle sand drilling in Unit 5?

A. Yes, I recall that I had a conversation with them in connection with that.

Q. When was that?

A. It was sometime subsequent to 1940.

Q. How do you fix that date?

A. We had drilled one well on the Cedar Creek acreage to the Eagle sand, and that well was completed in 1940, and Mr. Jirik and Mr. Seivers came [382] up to the office to discuss the possibility of having further wells drilled on their acreage to the Eagle sand.

Q. Now, what have you to say as to visits, or the frequency of visits by Mr. Jirik to your office during a period, we will say 1937, 1938, on to about the time this suit was commenced?

A. Mr. Jirik used to stop into the office frequently and discuss with me progress that was made in connection with the deep drilling of these wells. He was very much interested.

Q. Did he stop in and discuss with you from time to time the drilling of your first three wells, N. P. 1, Smith No. 1 and Warren?

A. I think he came in occasionally. I was out in the field considerably during the drilling of those first three wells, and he was out there several times during the drilling operations.

Q. What about his visits during the drilling of the Carter well?

(Testimony of Cecil W. Smith.)

A. He stopped in frequently while the Carter well was being drilled and wanted to know the progress, how they were coming along, and generally the results of the drilling.

Q. And did he make any visits during the drilling of the Husky well? A. Yes, he did.

Q. And did you discuss that well and its progress with him? [383]

A. Yes, that is correct.

Q. And were any visits made subsequently with reference to the development that Shell undertook and was carrying on under its contract?

A. I don't believe so.

Q. Mr. Smith, has the Fidelity Gas Company at any time in the past received from any of the plaintiffs or their predecessors in interest any written notice claiming a default in the performance of drilling, operating, or producing obligations under the Fidelity operating agreement?

A. It never has.

Q. Have any of the plaintiffs or John Wight or Mr. Jirik, individually, ever requested Fidelity Gas Company to give a release of the Fidelity operating agreement covering their respective lands?

A. No one has ever requested a release.

Mr. Lamey: You may cross examine—pardon me. You may cross examine.

(Testimony of Cecil W. Smith.)

Cross Examination

Q. (By Mr. Erickson): With reference to your testimony as to the officers of Fidelity, you said you thought Mr. Hayes was President of Fidelity. Is he President, or isn't he?

A. That is my recollection; I don't recall. [384]

Q. If he is the president, do you recall how long he has been president?

A. If he is president, he has been president since the beginning.

Q. Might it not be true that Mr. Heskett is President of Fidelity?

A. I couldn't tell you for certain.

Q. Now, prior to the time of the making of the unit agreement, which is Exhibit 3, did you purchase any gas from Mr. Wight or from the companies with which he was associated, having in mind Capital Gas and Montana Eastern?

A. I don't believe so.

Q. Now the gas that was purchased under the agreement of 1929, which is in evidence here, between you and Cedar Creek Oil and Gas Company, the price stated in that contract, as I recall, is three cents, is that your recollection of it also?

A. I am not sure, I would have to look at the contract.

Q. An examination of the contract indicates three and a half a thousand for the gas from shallow wells, and five cents from deep sand. Would that be your recollection of it also?

A. That is correct.

(Testimony of Cecil W. Smith.)

Q. Now, during all of the period in which you have purchased gas in the Cedar Creek area, do you know what price you have paid for gas purchased from the Federal Government? [385]

A. Royalties on Government gas are fixed at five cents.

Q. So that the amount that is charged as royalties in these statements on a unit operation reflect a five cent price, is that correct?

A. On the royalty gas.

Q. What price have you paid during all these years for the gas you purchased from Montana-Dakota Utilities Company?

A. We don't pay anything.

Q. I mean from the Northern Pacific Railway Company.

Mr. Lamey: Object to this as incompetent, irrelevant and immaterial, improper cross examination.

Court: What is the purpose?

Mr. Erickson: The witness has testified at some length about buying gas from these plaintiffs prior to the time of making the contract as part of the general over-all considerations, and it is to refute the suggestion in our testimony that there was pressure on these people to enter into an agreement, and the statement was made by this witness that all the purchase agreements were negotiated with all the people involved in this unit, and the purpose of this is to establish there was a different basis for making the purchase contract with the

(Testimony of Cecil W. Smith.)

Northern Pacific, one of the participants than with these plaintiffs.

Court: What would that prove?

Mr. Erickson: It would prove the general [386] conditions under which the contract was negotiated; and, in fact, the witness has testified they were all the same, and to show they were not the same, and, of course, it would tend to impeach the witness.

Court: If that is the purpose, you may proceed for that purpose.

Q. Is a different price paid the Northern Pacific in the same area in Unit 5 than is paid to these plaintiffs in the purchase of gas?

Mr. Lamey: When? Would you fix it?

Q. During all the time, right from the start.

A. The gas purchased from the Northern Pacific Railway is on a royalty basis; it isn't on a gas purchase basis. I believe that there was a well near Unit No. 5 that the Northern Pacific owned, and my recollection is that that gas was paid for at three cents.

Q. But your contract with the Northern Pacific is not the same as these insofar as the unit people are concerned, primarily because the Northern Pacific is the owner of the fee, is that what you are saying?

Mr. Lamey: We object on the grounds it is incompetent, irrelevant and immaterial, no proper foundation laid. The contract itself is the best evidence.

Q. Very well. Do you have the contract, Mr.

(Testimony of Cecil W. Smith.)

Smith, between Montana-Dakota Utilities and the [387] Northern Pacific Railway on any lands involved in Unit 5?

A. I think there are a few tracts belonging to the Northern Pacific in Unit No. 5.

Q. And do you have available any of those contracts covering the gas operations there?

A. I don't, but I would say this, that those are leases, those are not gas purchase contracts. We have no gas purchase contracts other than the one I mentioned with the Northern Pacific.

Mr. Erickson: I may say, counsel, that is the only purpose I had in asking the question. I wanted to explain what the situation was. It wasn't with the purpose of trying to prove any part of my case that I asked the question.

Q. You have mentioned that when the unit agreement was under negotiation and under discussion, the term for the companies represented by Mr. Wight was a definite term because of their efforts to build a pipe line to ship their gas, is that a correct statement of the situation, Mr. Smith?

A. I believe it is.

Q. Now, isn't it a fact, Mr. Smith, that it was during that period that Mr. Wight started this litigation of which you spoke, which had to do with securing a right for transportation over your lines, and that actually the concern was the completion of that litigation that dictated the five year term?

A. Well, I think that was partly it, and I believe that the records of the meeting show that he

(Testimony of Cecil W. Smith.)

stated that he wanted to build a pipe line and that was the reason he hadn't made any contract sooner.

Q. But, as to the five year contract, the primary consideration was the litigation pending, is that correct? A. I don't believe it was.

Q. Was that discussed?

A. I think it was discussed.

Q. You mentioned a record of the meeting. Were there formal minutes kept of the meeting to which reference has been made? A. Yes.

Q. Do you have those minutes? A. Yes.

Q. Do you have them here? A. Yes.

Q. I wonder if I might see them?

Mr. Lamey: May I inquire so I will have those before us, were those records kept by a U. S. G. S. man? Is that the record you are referring to?

Witness: Those were kept by a representative of the U. S. Geological Survey.

Q. I hand you, Mr. Smith, a document consisting of several sheets, entitled "Memorandum of Conference Re Unit Operation," and ask you if those are the records of which you spoke insofar [389] as the meeting is concerned?

A. That is correct.

Q. And that record, as you have indicated, was prepared by a representative of the Secretary of the Interior, Mr. Duncan, is that true?

A. That is correct.

Q. Do you know whether that is the only copy of that memorandum that you have?

A. No, there were other copies of this, and they

(Testimony of Cecil W. Smith.)

were transmitted to the various parties who attended the meeting.

Q. I am asking just for convenience here whether you have another one because I would like to have this put into the record.

A. I don't believe I have; we may have it somewhere.

Mr. Erickson: The memorandum having been marked Plaintiffs' Exhibit 49, and having been identified by the witness as the record of the meeting as kept by the representative of U. S. G. S., the plaintiffs offer Exhibit 49.

Mr. Lamey: No objection.

Court: It is admitted.

(Plaintiffs' Exhibit 49 admitted in evidence.)

Q. Now, calling your attention to the report in the memorandum of the conference, the paragraph numbered 2, I will ask you to read that, and then with your memory refreshed by reading that, state whether or not the discussion insofar as [390] Mr. Wight was concerned on the five year term was restricted to a discussion of the pending litigation?

A. That is the substance of the minutes. Of course, the minutes did not include the whole discussion, and the discussion covered a wide range, and whether this was the entire reason for the five year term, or whether a pipe line was to be constructed——

Q. But insofar as the minutes show——

(Testimony of Cecil W. Smith.)

A. Insofar as the minutes show, that is what Mr. Duncan put down.

Q. With reference to the meeting of May 2, 3 and 4 of 1934, concerning the unit agreement, the gas purchase agreement and the operating agreement, were there any other conferences, either before or after, with Mr. Wight concerning these matters?

A. I don't recall any other conferences with respect to that. There may have been discussions from time to time with Mr. Wight. This was the only conference that I remember where all parties met with U. S. Geological Survey representatives to finally work out a program.

Q. Had there been conferences, formal or informal, between you and Mr. Wight prior to this formal meeting of May, 1934?

A. I am not clear in my memory, but I think there had been.

Q. Can you say whether they were or were not held in Billings? [391]

A. No, they were not held in Billings.

Q. At the conference in Billings there were under discussion three instruments, according to these minutes, the Unit No. 5 agreement, which is Exhibit 3; the gas purchase agreement, which is Exhibit 4; and the operating agreement, which is Exhibit 5, is that your recollection of the matter?

A. That is correct.

Q. Now, as to the agreement concerning the operation of Unit No. 5, was there an agreement

(Testimony of Cecil W. Smith.)

in draft form at the time you started the conference? A. Yes.

Q. And who had prepared that, do you know?

A. My recollection is that agreement had been prepared and had been submitted to the U. S. Geological Survey several times for their ideas on what the agreement should be. You understand, when this agreement was made, it was one of the first unit agreements that was worked out by the U. S. Geological Survey. Sometime afterward, they got out a standard form of agreement.

Q. But the original drafting work was done by Montana-Dakota Utilities Company, was it not?

A. It was done by Montana-Dakota Utilities Company, and the basis for that was a unit agreement that the U. S. Geological Survey had worked out with Carter Oil Company covering the Billy Creek field. [392]

Q. Insofar as Unit 5 was concerned, was any part of the drafting of the agreement or any part of it done by the plaintiffs or these other folks?

A. Yes, the agreement was brought out at the meeting, and it was gone over word by word, and suggestions were made by Mr. Wight, Mr. Norbeck and Mr. Huntington, and the agreement was finally agreed upon by all the parties.

Q. Was the agreement as to Unit No. 5, which now appears in printed form in printed form at the inception of the conference of May, 1934?

A. No, it was not.

(Testimony of Cecil W. Smith.)

Q. The printing occurred thereafter, is that correct?
A. That is correct.

Q. Now, with reference to the changes that were made by any request of the plaintiffs or their predecessors, can you indicate generally what changes were made in the contract?

A. I can't offhand, but I think they are outlined rather completely in the minutes of that meeting.

Q. With reference to the minutes as to the plan of operation of Unit 5, from your reading, you will recall that reference was made to certain litigation then pending?
A. That is correct.

Q. So that as early as 1934, there was litigation pending between your people and Mr. Wight's people, is that correct?
A. That is correct. [393]

Q. And isn't it a fact that since about 1930, or perhaps even before that date, there has always been litigation pending between Mr. Wight's group and your group?

A. No, that is not correct. I don't think the litigation started until 1933 or 1934.

Q. Well, starting with 1933 and 1934, and through this period in 1938, there was litigation pending, was there not, at all times, between Mr. Wight's interests and yours?

A. No—you mean through 1938?

Q. Yes.
A. That is correct.

Q. So, that the fact there was litigation pending during 1937 and 1938 was not an unusual situation, is that correct, up to that time?

(Testimony of Cecil W. Smith.)

A. Well, it was unusual in that we had worked out this arrangement and attempted to dispose of the litigation, and it was not disposed of.

Q. But there was litigation pending at the time you made this agreement and went through the preliminaries in 1935, is that correct?

A. That is correct.

Q. That didn't prevent you and Mr. Wight from discussing business matters, did it?

A. It didn't up until the time the agreement was worked out.

Q. After the time of the signing of the unit [394] agreement in 1935, is it your testimony you had no further conferences with Mr. Wight through the years 1935, 1936 and 1937, concerning business affairs?

A. That is correct.

Q. You recall no meetings with Mr. Wight from the signing of the unit agreement on through 1938?

A. No, I do not.

Q. As to the gas purchase agreement, the minutes would indicate that there was little discussion, is that your recollection of it?

A. I believe the only discussion we had with respect to the gas purchase agreement, there were some changes made in it as requested, but I think the only discussion of any consequence was the term of the agreement.

Q. With reference to the operating agreement, Exhibit 5, the minutes indicate there was not very much discussion, is that your recollection of it?

A. In my recollection of that, that is correct.

(Testimony of Cecil W. Smith.)

The operating agreement was read, gone over paragraph by paragraph, and there were very few comments made with respect to the deep test operating agreement, because everyone at that time was very anxious to get the acreage in the area consolidated so that drilling could be carried on.

Q. Do you know who prepared the operating agreement?

A. I think we prepared the operating [395] agreement. I believe there was discussions of the form of the operating agreement over several months with a large number of parties who were involved.

Q. Do you recall whether the operating agreement was in a printed form at the inception of the conference at Billings? A. I believe it was.

Mr. Erickson: May it please the Court, in view of the rather extensive cross examination that will be necessary, I think we might save the Court's time if we had a recess now until tomorrow morning so we could prepare our examination a little better.

Court: Very well, Court will stand in recess until ten o'clock.

Mr. Erickson: I am sorry, your Honor, but there are some of these exhibits we have not had a chance to examine that we would like to examine the witness on on cross examination. We would like leave to take out of the files for overnight the instruments that have to do with the Carter drill-

(Testimony of Cecil W. Smith.)

ing, the Husky drilling, and the minutes that we have just referred to.

Court: You will keep them in your possession, Judge, and be responsible for them. That is agreeable. Court will stand in recess until 10 o'clock tomorrow morning.

(Whereupon, a recess was taken until 10:00 a.m., the following day, April 16, 1955, at which time the following proceedings were had:)

Q. Mr. Smith, you testified that all of the lands in the area delineated by the lines around Unit 5 came into the unit, is that correct?

A. I believe that eventually there was one piece of Government land that came in under a compensatory royalty agreement.

Q. It wasn't in as one of the regular signers of the unit agreement, is that correct?

A. Correct.

Q. As of the year 1936, there was still considerable acreage that was not in Unit 5, is that true or not?

A. I don't recall.

Q. At any rate, they didn't all sign up at the same time on the unit plan?

A. That is correct, it extended over a period of a year or so.

Q. Yesterday Mr. Lamey asked you about the Eagle sands, and he asked you if it was unitized, and your reply was first that it was, then later you said it was not in a participating area. Now, what do you mean by that?

A. I meant that the agreement for unit opera-

(Testimony of Cecil W. Smith.)

tion provided for the further unitization of other gas or oil horizons, and that there had not yet been a definite plan put into effect for the Eagle sands.

Q. So that actually your answer to Mr. Lamey should have been that it is not unitized, is that correct? [397]

A. No, that isn't correct. It is unitized under the original agreement, but the definite plan for that horizon has not yet been approved by the Secretary.

Q. Isn't it a fact, Mr. Smith, that for a number of years you have been negotiating with Cedar Creek Oil and Gas and others seeking to get them to join you in the unit plan for the Eagle sands?

A. In accordance with the terms——

Q. Now, I am asking you, haven't you carried on negotiations with them?

A. Carried on negotiations for the establishment of the unitized area in the Eagle sands.

Q. Is there any unitization of the Eagle sands at all at present?

A. There is not, except as to the agreement that they will be unitized.

Q. Just answer my question. Is it unitized?

A. The participating area has not yet been determined.

Q. Mr. Smith, you know what participating area is, do you not? A. Correct.

Q. For example, in 8 or 8-A, you have it unitized, but there is only part of the land surface

(Testimony of Cecil W. Smith.)

that is included in the participating area, is that correct? A. Correct. [398]

Q. Participating area doesn't have anything to do with which sand it is, does it?

A. It has to do with each sand operated.

Q. You have unitized the Judith River sands, have you not? A. Correct.

Q. And the unit agreement, Exhibit 3, specifically relates to the Judith River sands, does it not?

A. The unit agreement, in paragraph 3, provides as follows: "It is agreed, however, that this co-operative or unit plan is limited and shall apply only to operations or development, production and marketing of natural gas from the geologic formation constituting the Judith River sand in said Unit No. 5, deposits of gas from other sands, and deposits of oil from any and all sands being expressly excluded from the force and effect of this agreement; except that the parties hereto hereby consent and approve and authorize the operator to include all their interests in any similar unit plan of development and operation which may be approved by the Secretary of Interior, which may cover the development, production and marketing of natural gas from any other sands, or deposits of oil from any and all sands. In case a majority of the parties hereto cannot agree upon the details of any such similar unit plan of development, it is hereby agreed that the decision of the Secretary upon such disputed details shall be final and binding upon the parties hereto." [399]

(Testimony of Cecil W. Smith.)

Q. All right. Until there is action taken under that last paragraph, and there is unitization of the Eagle sands, can there be, or can they be a part of any participating area in any unit?

A. It can as soon as the Secretary determines the disputed details.

Q. Details of what?

A. Details of the plan that is submitted.

Q. It is a unit plan, is it?

A. It is further unitization under this clause.

Q. It is a unit plan similar in structure to the one in existence on Unit 5, is that correct?

A. Correct. We have authority to include the lands in any similar plan.

Q. Has the Eagle sand ever been included in any similar plan?

A. It has not because we have never received the disputed details to work out.

Q. Have you ever had the consent of Cedar Creek Oil and Gas to include it in the unit agreement?

A. Yes.

Q. Do you have it with you?

A. It is in the operating agreement.

Q. You have had extensive negotiations with Cedar Creek Oil and Gas seeking an agreement from them to join in a unit plan for the Eagle sands? [400]

A. No, we have not. We sent the proposed plan out to all parties with the request if there was any objection to it, we would like to receive it. We have never received those objections from Cedar

(Testimony of Cecil W. Smith.)

Creek or any of the others. I understand there were objections that were filed with the Secretary of Interior.

Q. Have you not, as a matter of fact, received a letter signed either by George Seivers or Mr. Jirik reporting their Board of Directors had refused to okay the unitization of the Eagle sands?

A. I may have received such a letter, but didn't receive any statement from them as to what the disputed features of the plan were.

Q. But they did turn down the plan.

A. I don't think they turned down the plan. They said they had refused to accept the plan, but they didn't follow the procedure outlined in the agreement. The agreement was returned to us by the U. S. Geological Survey for some revision that they suggested. That is the present status of the negotiations.

Q. You also negotiated with H. C. Smith and W. B. Haney about putting their lands in the unit plan?

A. We sent them copies of the plan at the same time as Cedar Creek and all other parties.

Q. As a matter of fact, H. C. Smith turned it down, did he not? [401]

A. I don't recall.

Q. The unit plan for the Eagle sands was submitted to the Secretary of Interior, was it not?

A. It was submitted to the supervisor of the Geological Survey, and I understand it was forwarded to Washington.

(Testimony of Cecil W. Smith.)

Q. Do you know what, if any, action was taken on it?

A. It was returned to us with a request for modification in the proposed participating area.

Q. As a matter of fact, the proposed unitization of the Eagle sands was suggested as early as 1938, was it not? A. I don't recall.

Q. If I were to tell you the records would show there was a proposal for unitization as early as 1938, and it was turned down by the Secretary, would you be able to say whether I was right or not?

A. I would have to see the correspondence to determine just what did take place.

Q. As to the Eagle sands, the operations as of now are that the gas is purchased by the Montana-Dakota Utilities Company, is that correct?

A. That is correct.

Q. Under a gas purchase contract?

A. That is correct.

Q. Insofar as the various wells are concerned, [402] there is no pro-rating the income over non-productive and productive lands as there is in the unit plan, is there?

A. No, there is not at the present time. That was the purpose of proposing to set up a participating area for that sand.

Q. Income is not distributed in accordance with the provisions of the Fidelity gas agreement, is it?

A. I don't recall what provision there is in the

(Testimony of Cecil W. Smith.)

Fidelity gas agreement for the distribution of income.

Q. The provision of that agreement calls for a 75-25 split after payment of all expenses. The gas isn't paid for from the Eagle sands under any such arrangement, is it?

A. The Fidelity gas agreement has nothing to do with the Eagle sands. That exempts everything above 2,000 feet.

Q. When you took over Unit 5, who owned the gas wells? I think you said as you recall, there were from 12 to 14 wells in total on the unit when you took over its operation.

A. I believe that Cedar Creek owned two or three wells, I am not sure, and I believe that John Wight's group had some four or five or six wells. I am not familiar offhand with the ownership at that time, it is a long time ago.

Q. And how many did Montana-Dakota Utilities own, do you remember, or Gas Development?

A. I think there was only one or two.

Q. As of today, how many wells are there in Unit 5? [403]

A. I couldn't tell you offhand.

Q. If I were to tell you there were 17, would that square with your recollection?

A. Oh, I would say there was probably 17 or 20, somewhere along there.

Q. You wouldn't think it would be more than 20?

(Testimony of Cecil W. Smith.)

A. Well, it might be; I haven't kept track of individual wells.

Q. Would the Exhibit 1-A show the number of wells?

A. I didn't prepare Exhibit 1-A, so I couldn't say whether it shows all the wells or not.

Q. I don't believe it bears a date, either, does it? Yes, 1934.

A. That is the old date.

Mr. Lamey: So there won't be any question about the record, I think you are referring to a date of the U. S. Geological Survey print, are you not?

Mr. Erickson: Probably.

Mr. Lamey: The map actually was prepared shortly before the pretrial conference in Butte as to wells.

Q. Do you know who prepared this map, Mr. Smith?

A. No, I don't.

Q. You don't know who put the legends on?

A. No.

Q. Do you know whether it was done by [404] somebody in the office of Montana-Dakota Utilities Company?

A. I don't know.

Mr. Lamey: Counsel, I think I can help you. It was prepared in the Geological Department of the Shell Oil Company.

Mr. Erickson: Is it agreeable that we may refer to that map for the number of wells in the unit as of now?

Mr. Lamey: I don't know if they were all on there.

(Testimony of Cecil W. Smith.)

Mr. Johnson: I am not sure that map was prepared with the objective of showing the particular number of Judith River wells, but I think we could get that information for you.

Mr. Erickson: I would appreciate it, and it would shorten the examination.

Q. There was some discussion yesterday about the taking of extra gas to make up for compensatory royalties that were paid. Do you recall that testimony? A. I do.

Q. What land was being produced that resulted in the drainage that required payment of compensatory royalties, do you know?

A. I am not sure.

Q. It would have to be fee lands, would it not?

A. It would have to be fee lands.

Q. Isn't it a fact, as reflected by these minutes, that this agreement on the part of Montana-Dakota [405] Utilities to buy extra gas in Unit 5 to make up for compensatory royalties applied to purchases from everyone, did it not?

A. I don't get your question.

Q. In your testimony yesterday, you indicated that you bought extra gas from these plaintiffs before the Federal Government would approve of the unit agreement to take care of this additional amount that had to be paid for compensatory royalties. You made the same purchases from everybody in the unit, didn't you? A. No, we did not.

Q. Who didn't you make purchases from?

A. We only made purchases from wells located

(Testimony of Cecil W. Smith.)

on lands Mr. Wight and his group owned and where the U. S. Geological Survey had claimed there was drainage.

Q. Was there any other land in the unit that you recall where U. S. G. S. claimed there was drainage? A. I believe not.

Q. Yesterday you said that the boundary of Unit 5 north and south was determined by negotiation between the parties, but as to the east and west, that was determined by the U. S. Geological Survey people, is that correct.

A. No, I think I said the boundaries north and south were determined more or less by the land ownership, and that the ones on the east and west were determined by agreement with the U. S. Geological Survey. [406]

Q. It is a fact, is it not, that as to the east boundary, it originally included lands over in 60, and that by reason of the objection of Wight and Norbeck, and with your consent, the boundary was pulled in on the east, do you recall that.

A. Yes, I recall that, and that subsequently the unit agreement was modified by a supplement which included those lands in 60.

Q. But, at the time of the negotiation, that east boundary was fixed originally because of the discussion between the parties, isn't that correct?

A. That is correct. The discussion between the parties also involved the U. S. Geological Survey, I believe, as the record shows.

Q. Did you testify yesterday there weren't any

(Testimony of Cecil W. Smith.)

preliminary meetings between you and John Wight prior to the meeting of May, 1934?

A. I don't believe I did. I think I said there may have been some preliminary discussions, but the meeting at Billings was the one which finally determined the features of the agreement.

Q. You made a trip to Faribault, Minnesota, to discuss these various agreements, you indicated yesterday. Was there more than one of these trips?

A. There was only one to Faribault.

Q. Were there other meetings with the Cedar [407] Creek people concerning the making of the three contracts?

A. We had discussions with Mr. Jirik quite frequently before that in connection with the working out of the deep test and the unit agreement.

Q. Would those discussions have taken place in your office in Minneapolis?

A. I think they did.

Q. Were the contracts, particularly the Fidelity operating agreement signed at the time of your trip to Faribault?

A. I am not sure, I don't believe they were.

Q. If I were to tell you that both the operating agreement and the unit agreement with Cedar Creek were signed on the same day, the 7th of February of 1935, would that serve to refresh your recollection as to whether they were signed at the time you made the trip to Faribault?

A. No, it would not.

Q. Under what circumstances were the agree-

(Testimony of Cecil W. Smith.)

ments, the Fidelity operating agreement and the unit agreement, given to Mr. Jirik of the Cedar Creek Company, do you recall that?

A. I believe that the agreements had been furnished to him sometime prior to that and that he had gone over them and he had a number of questions from time to time that occurred to him as he read them, and we had discussed the various things in connection with both of the agreements from time to time, and he had wanted to know just [408] how it was going to affect his income, and the sale of gas, and a number of questions of that kind that were discussed, I would imagine, over a period of four or five months before they were executed.

Q. Do you know whether Cedar Creek drafted any part of the agreement.

A. No, they did not draft any part of the agreement, because the agreements had been worked out with Mr. Wight and his associates and the U. S. G. S. sometime prior to that.

Q. Mr. Jirik testified that at the discussions concerning the making of the Unit 5 agreement, you had told him that unless they signed the unit agreement, you would purchase no more gas from them. Did you hear that testimony? A. I did.

Q. What have you to say as to its accuracy?

A. I would say it was inaccurate because no such statement was ever made.

Q. Mr. Wight made substantially the same state-

(Testimony of Cecil W. Smith.)

ment, as you heard. What have you to say as to the accuracy of it?

A. I don't recall what Mr. Wight's statement was; I don't recall that he made such a similar statement.

Q. Well, I believe Mr. Wight made the statement, but if he did make the statement, can you say whether it would be true or not?

Mr. Lamey: May it please the Court, this is argumentative, and assuming a state of facts not shown to exist. [409]

Court: Sustained.

Mr. Erickson: I believe he said it.

Court: It is not up to the witness to decide whether or not what he said was true, it is one of the problems I have to decide.

Mr. Erickson: I was trying to avoid the necessity of going back into the record.

Court: You can ask him if he made any such statement.

Mr. Erickson: Thank you, your Honor, the solution was so simple, it escaped me.

Q. Did you ever say to John Wight in the course of negotiations for the unit agreement that unless he and his group signed the unit agreement, you would not purchase gas from him and his group?

A. I don't think any such statement was ever made.

Q. Are you quite sure about it? A. Yes.

Q. Now, if you made no such statement, and if

(Testimony of Cecil W. Smith.)

the Wight's group or the Seivers' group didn't join the unit plan, how could you purchase gas from them on their sands within the unit area?

A. We already had contracts with the Cedar Creek Gas and Oil Company to purchase gas from any and all sands on any of their acreage. That was made in 1929 long before the negotiations on the unit were commenced. Of course, as far as [410] Mr. Wight and his associates were concerned, we had endeavored to buy gas from them over a period of years, but had been unsuccessful.

Q. So, you would be free to purchase gas from non-members of the unit agreement out of the unit area, is that correct?

A. Well, the leases or the agreements with respect to the purchase of gas would have had to be made subject to the unit agreement if it had been made prior to that.

Q. So, in other words, you are now saying that you could not buy gas from lands in the unit area that were not committed to the unit agreement without something in the purchase agreement making the lands subject to the unit agreement, is that correct?

A. No, not necessarily. All that we would have had to have done would be to protect the unit lands against drainage under those circumstances.

Q. My understanding of your testimony yesterday was that your arrangements with Northern Pacific as to gas are somewhat different than they are with the plaintiffs, is that correct?

(Testimony of Cecil W. Smith.)

A. Correct.

Q. Do I understand you hold leases on the Northern Pacific lands? A. That is correct.

Q. And the payments for gas are made in the form of royalty payments rather than under a gas purchase contract? [411]

A. That is correct, they are not comparable.

Q. In your testimony, the 90 per cent of the area on the Cedar Creek Anticline was committed to the unit agreements, by that you didn't mean 90 per cent of the total area was represented by owners who signed the unit agreement, is that correct?

Mr. Lamey: Read that question again.

(Question read back by Reporter.)

Mr. Lamey: It seems to me it is the same thing. I don't know just what you are asking.

Q. I wanted to be sure as to the extent of the coverage of the unit agreement of this area. You said 90 per cent?

A. You are talking about——

Q. The whole area.

A. You are talking about the unitized Judith River sand?

Q. Yes.

A. Yes, I would say 90 per cent of the entire producing area of the Judith River is covered by unit agreements.

Q. At the outset, Unit 8, which has now been made into two units, was an oil unit, was it not?

A. That is correct.

Q. So, your statement would be modified to the

(Testimony of Cecil W. Smith.)

extent that the area in 8 and 8-A is involved, is that true?

A. 8-A and B are unitized as to the shallow sands.

Q. How long ago did that occur? [412]

A. I think it was approved in 1942.

Q. It is a fact, is it not, that as to Unit 8 and 8-A, considerably less than 90 per cent of the area is covered by the Fidelity agreement as of now, is that true?

A. Read that question?

(Question read back by Reporter.)

A. No.

Q. Since the making of the Fidelity agreement down in Unit 8 and 8-A, a considerable amount of acreage that was once committed to the Fidelity agreement is no longer committed to the Fidelity agreement, is that correct?

A. No.

Q. Have you dropped any Fidelity agreements in Units 8 and 8-A?

A. We have not dropped any Fidelity agreements. At the time Units 8-A and 8-B were formed, the boundaries of what had formerly been Unit 8 were reduced, made smaller.

Q. And as a result, were some of the Fidelity agreements relinquished or cancelled or terminated?

A. Some acreage that was included under Fidelity agreements was dropped.

Q. I call your attention now to Defendants' Exhibit 46, which is your contract with the Husky Refining Company, and particularly to page 11, and I see opposite the paragraph 13 certain ini-

(Testimony of Cecil W. Smith.)

tials, and one of them apparently is yours, is that correct, "C. W. S."? [413]

A. That is correct.

Q. In that paragraph, it is recited that certain tracts are not covered by Fidelity agreements and that certain tracts may have been covered and are no longer covered, is that true?

A. That is correct.

Q. Acreage involved is considerable, is it not?

A. I think there was quite a substantial acreage dropped at that time. However, that was dropped from Fidelity agreements. Fidelity agreements are still effective as to the remaining acreage that is within the boundaries of Units 8-A and 8-B.

Q. As to the area down in 8-A and 8-B, when did gas production start there?

A. In 8-A and 8-B, I believe about 1941 or 1942.

Q. How were the rentals being paid on the lands down there prior to the time gas production started?

A. The rentals down there, I believe, were being advanced by Montana-Dakota.

Q. And under what sort of arrangement, do you know?

A. Under an arrangement with the owners of the lands.

Q. And were payments made pursuant to the provisions of the Fidelity operating agreement?

A. I believe they were made pursuant to both a Fidelity operating agreement and a temporary

(Testimony of Cecil W. Smith.)

[414] gas purchase agreement which we had with the owners of the lands down there.

Q. I am talking about the period before there was gas production?

A. We had had a temporary gas purchase agreement from some of the owners down there, although there was very little gas produced under that agreement.

Q. As to these lands that were dropped, were they lands on which Fidelity Gas or Montana-Dakota Utilities was paying federal rentals prior to the time they were dropped?

A. I don't recall, I think some of them were.

Q. Can you recall the date on which these various tracts were dropped, as referred to in the exhibit?

A. As I recall, it was somewhere around 1940, 1941 or 1942.

Q. Now, it is a fact, is it not, Mr. Smith, that prior to 1941, Fidelity Gas, or Montana-Dakota Utilities, on its behalf, was paying the federal rentals on substantial acreage in the Cedar Creek Anticline that was covered by the Fidelity operating agreements, is that correct?

A. I believe they were paying rentals where gas production was not sufficient to take care of the rents out of production from shallow gas.

Q. After the abandonment of the Warren well, was that practice of paying the rentals, the royalties on federally owned land continued where there was not sufficient production to pay the rentals?

(Testimony of Cecil W. Smith.)

A. What lands are you talking about?

Q. Federal lands which were included, originally covered by the Fidelity operating agreement.

A. Are you referring to Unit 5?

Q. Any place up and down the structure first?

A. I believe that where royalties were not sufficient to pay rentals, that money was advanced by the Montana-Dakota Utilities Company.

Q. Did they continue to do that after 1938?

A. Yes.

Q. And to what extent?

A. I couldn't tell you what extent. That depended on gas production from time to time. It depended too on the provisions of the unit agreements as well as the Fidelity agreements.

Q. Were there cases where you signed Fidelity operating agreements where there were no unit agreements?

A. Yes.

Q. How extensive was that?

A. Well, I believe at the time of the Fidelity operating agreements, when they were obtained, there were no units organized south of Unit No. 5, and that the Fidelity agreements covered all of the acreage in that area, and the unit agreements were subsequently made covering that acreage.

Q. Can you say whether or not even as of today [416] you have lands described by the Fidelity operating agreement that are not in any unit agreement?

A. I don't believe so.

Q. Now, after 1941, can you say whether you dropped other lands out of the Fidelity operating

(Testimony of Cecil W. Smith.)

agreement beside those covered in the Husky agreement on which you had theretofore been paying the Federal rentals and royalties?

A. I don't think there were any dropped, and the only reason those were dropped in 8-A and 8-B was because of the setting up of the new boundaries of the units, which was done at the request of the U. S. Geological Survey.

Q. Isn't it a fact, Mr. Smith, you had a considerable acreage covered by agreements with Capital Gas Corporation in Township 8 North, Range 59 East, on which you quit making payments so far as royalties are concerned sometime prior to 1940, I mean Federal rentals, prior to 1940?

A. Federal rentals prior to 1940, I don't recall it.

Q. Do you recall anything about those Capital Gas lands up there in what is now Unit 4, as to whether they are still covered by your Fidelity agreement?

A. Which Capital Gas lands are you referring to?

Q. I am talking about Sections 1 and 3 and a portion of Section 9 and all of 11, 8 North, Range 50 East, it would be up in this—strike that last question, please. There are many cases where you [417] have the Fidelity operating agreement where there is no gas purchase contract either, isn't that true?

A. I don't recall any.

Q. What about up in Unit 1?

(Testimony of Cecil W. Smith.)

A. In Unit 1, we have a gas purchase contract up there.

Q. And that is true of all units up and down the line? A. That is correct.

Q. You have already testified as to Unit 8, now 8-A and 8-B, the operating agreement was made considerably prior to the time the unit agreement was signed, is that true? A. Correct.

Q. Would it likewise be true it was signed before the gas purchase contract was entered into down there? A. Yes.

Q. That likewise would be true of 6 and 7, the ones south of 5, is that correct?

A. That is correct.

Q. Now, with reference to the lands described in the Husky agreement at page 11, the lands that were relinquished, can you tell us what form the relinquishment took by way of formal action on your part?

A. My recollection is that in connection with the relinquishment of those lands, the owners of the leases executed a relinquishment to the United States — those were government leases — and also that they were released from the operation of the [418] Fidelity agreement, as I recall it.

Q. So, those lands, you think, reverted back to the Federal Government, is that correct?

A. Yes, that is correct.

Q. It seemed to me, Mr. Smith, there was included in that list some Northern Pacific lands that

(Testimony of Cecil W. Smith.)

had been relinquished. Would you say I was incorrect on that?

A. Yes, you are incorrect on that.

Q. At the time the Northern Pacific well was drilled, there was no unit agreement in effect as to then Unit 8, was there?

A. I am not sure of the date of the Unit 8 agreement. There was one that was negotiated, had been agreed to by the parties, and we were engaged in working out the terms of it with the U. S. Geological Survey. If it was not approved at the time the well was drilled, it was approved shortly thereafter.

Q. Have you said the Northern Pacific signed exactly the same operating agreement as the plaintiffs here, Form 247?

A. No, we signed the operating agreement; we have the leases on the Northern Pacific lands.

Q. That is the arrangement under which that was done? A. Correct.

Q. So that all the Northern Pacific land in the area is represented in the operating agreement through you, is that correct? [419]

A. Correct.

Q. I am a little confused as to the time of the cementing of the Carter well. I know the Carter well was finally abandoned in January, 1942. When would the cementing have occurred to which you referred?

A. The date I gave was the date they completed

(Testimony of Cecil W. Smith.)

cementing and recovered the last portion of the casing. The cementing lasted two or three days.

Q. The war having occurred in December, 1941, do you think there was a shortage of cement in early 1942?

A. I didn't say there was a shortage of cement. I said there was difficulty in getting steel pipe. They only put in 100 sacks of cement because they expected to shoot off their casing and recover it.

Q. Had the pipe shortage developed then by January, 1942?

A. In December, I believe it was December. It was about that time the limitation was put on drilling and securing of pipe, on the allocation of steel shortly after December 7, 1941.

Q. Who paid for the drilling of Northern Pacific No. 1 well? A. Fidelity Gas Company.

Q. And that was paid with Fidelity Gas checks, was it? A. My recollection is it was.

Q. Fidelity Gas Company maintained its own separate banking facilities, did it? [420]

A. I am not sure whether checks for material and things of that kind were paid with Fidelity checks or paid with Montana-Dakota checks and charged to Fidelity's account. Probably it was done both ways.

Q. Well, in fact, all of the Fidelity operations were actually paid for by M.D.U. money, were they not? A. Yes.

Q. Who paid for drilling the Smith well?

A. Fidelity Gas Company.

(Testimony of Cecil W. Smith.)

Q. Who paid for drilling the Warren well?

A. Fidelity Gas Company.

Q. As to the seismic work done by DeWolf, who paid for that?

A. I believe Fidelity Gas paid for that also.

Q. Had the operating agreements been executed at the time Mr. DeWolf did his preliminary work up there?

A. Which operating agreements are you referring to?

Q. The Fidelity operating agreements on Unit 5.

A. I believe they had. I think they were mostly executed in 1934.

Q. Who paid for the drilling of the Carter well?

A. Carter Oil Company.

Q. Who paid for the drilling of the Husky well?

A. Husky Oil Company.

Q. Who paid for the work done by the California Company?

A. The California Company. [421]

Q. Now, after the completion of the Warren well, how much money has Fidelity Gas paid for drilling, survey, or seismic work on the Cedar Creek Anticline?

A. It has not paid any itself. It has devoted its efforts to getting other people to come in there and to do the development.

Q. During the time the Warren and the N. P. No. 1 and Smith were being drilled, did Fidelity Gas have a staff of employees of any kind?

A. Well, the Montana-Dakota Utilities Company

(Testimony of Cecil W. Smith.)

was furnishing the staff that was required for that work.

Q. Do you recall whether they continued to be Montana-Dakota Utility Company employees during that period?

A. I don't think it makes any difference, particularly, whose employees they were, they were furnished.

Q. We think it does make a difference, so if you just tell me what you recollect as to how they were carried, Mr. Smith?

A. I don't recall how they were carried, as a matter of fact.

Q. You had to have field engineers and other employees during the drilling, did you not?

A. We had a field engineer that looked after the drilling, the building of roads, things of that kind, to carry on the operations.

Q. During that period of time—— [422]

A. Montana-Dakota Utilities Company was supplying a considerable part of that for Fidelity.

Q. Were Fidelity hiring some on their own account, do you remember?

A. I think geologists were hired by Fidelity for that work. Whose payroll they were actually on, I don't recall. The charges were charged to the cost of the wells and charged to Fidelity Gas Company.

Q. Under what arrangements were those three wells drilled, did you have a drilling contract with somebody, or how was that done?

A. Yes, we had a drilling contractor.

(Testimony of Cecil W. Smith.)

Q. So the equipment was not the property of Fidelity Gas?

A. That is correct; that is usual in the oil business.

Q. Now, since 1938, has Fidelity Gas had a geologist?

A. Yes.

Q. Paid for by Fidelity Gas?

A. No.

Q. Has that geologist been engaged in a study of the sands below 2,000 feet?

A. No, not particularly.

Q. And I would assume from what you have told me that Fidelity Gas as such has no engineer or staff of any kind, is that correct?

A. Correct. [423]

Q. And hasn't had since 1938?

A. All of those services were furnished up until 1938 and following by Montana-Dakota when it was necessary.

Q. But actually, you have indicated already that some of the cost of that, or probably all of the cost of that kind of service to Fidelity was reflected on Fidelity's books and charged against the wells, is that true?

A. Correct.

Q. Since that time have there been any charges reflected on Fidelity's books, reflecting the expense of engineers, seismic work, geologists, or anything else?

A. I don't believe we have, because we have negotiated with the companies that did the work out there to furnish the work themselves. Califor-

(Testimony of Cecil W. Smith.)

nia, Husky, Carter and Shell were all furnished under agreements we worked out with them.

Q. So, since 1938, the activities of Fidelity, as far as development work is concerned has been limited to these negotiations to which you refer, is that true?

A. I would say it was an important limitation.

Q. Would you explain that answer, Mr. Smith?

A. Yes. I would say that Fidelity's activity in securing development by these various companies is the most important activity that could be carried on as far as development of the anticline is concerned, and so far as benefits to all of the holders of Fidelity operating agreements. [424]

Q. Now, with reference to that, you testified yesterday at some length about the Carter and Husky contracts and negotiations with a Manning, and those negotiations, as I understand it, were primarily directed at Unit 8-A and 8-B, is that correct?

A. No, they were aimed at development anywhere on the structure. It happens in accordance with their geological theories, they wanted to start on Unit 8-A and 8-B first.

Q. The original Carter and Husky agreements as drafted, were both limited to lands described in Units 8-A and B, were they not?

A. That is correct.

Q. It wasn't until supplemental agreements were made that there was any reference in any of

(Testimony of Cecil W. Smith.)

your contracts to any lands outside of Units 8-A and B, is that true?

A. That is correct. We wanted to make them on Unit 8, or 8-A only to begin with.

Q. Pardon me, I didn't get Mr. Smith's answer. Read the answer.

(Answer read back by Reporter.)

Q. And it is a fact, is it not, that all the wells drilled in Unit 8-B are within a radius of about three miles, is that true? A. That is correct.

Q. Now, at the time the N.P. well No. 1 was drilled, what was [425] your opinion as a result of that drilling as to the possibility of recovering oil in commercial quantities in Unit 8-B?

A. Read that question again.

(Question read back by Reporter.)

A. You mean at the conclusion of drilling and testing operations?

Q. Yes.

A. Well, it was our opinion that there might be additional production encountered at greater depths.

Q. In that general area?

A. In that general area.

Q. Now, as the result of the drilling of the Smith well, did your conclusion change any in that regard? A. No, it did not.

Q. What about the effect of the Carter well?

A. Well, when the Carter well was completed, it was very difficult to judge what the results of the

(Testimony of Cecil W. Smith.)

drilling of that well actually were. That didn't give a great deal of information.

Q. You have testified here as to being President of Montana-Dakota Utilities Company, and you have testified as to rather extensive experience in this field of oil and gas, and with that background in mind, can you tell me whether or not in the general parlance of the oil and gas business, whether the Carter and Husky wells would be considered in the nature of [426] development wells or not?

A. Oh, I would say they were entirely in the nature of wildcat wells.

Q. Now, as to the Unit 5, did you make any specific attempt, or make any attempt, rather, to get specific contracts covering that unit similar to the contracts you got down in Units 8-A and B?

A. At the time we were negotiating those contracts on 8-A and 8-B, we were somewhat hesitant about making contracts for other points on the structure because we thought we might be able to negotiate better contracts as far as drilling obligations are concerned, as far as the rapidity of the drilling of wells and development was concerned.

Q. After the completion of the Warren well, what was your conclusion as to the possibility of getting commercial production in Unit 5?

A. We felt the possibility of getting commercial production anywhere along the structure at greater depths was very good.

Q. Tell us why, in the light of that, the Warren No. 1 well wasn't drilled to a greater depth?

(Testimony of Cecil W. Smith.)

A. Because at the time we had done about all the drilling we should do. We felt it was a problem for some major oil operator to come in and carry on development, and we were carrying on negotiations with the California Company for that company to do just that. [427]

Q. I think you have already answered it, but to be sure it is in the record, there were no negotiations with anyone under which you were trying to get a specific well in Unit 5?

A. The reason for that was they all felt the best possibilities were in 8-A and 8-B. That was the opinion of the geologists pretty generally.

Q. Was that your own opinion?

A. It was the opinion we held at that time. If we found production in 8-A and B, the possibilities of getting additional development on the anticline, and possibly on better terms, would be greatly facilitated.

Court: Court will stand in recess until 10 minutes after 11.

(10-minute recess.)

Q. After the completion of the Warren well, and for the balance of the years 1937, 1938, 1939 and 1940, there was no drilling going on to the deeper sands in the Cedar Creek Anticline on your behalf by anyone, was there?

A. That is correct. We were negotiating during that period of time with various companies for further development.

Q. So that at the time you place as sometime

(Testimony of Cecil W. Smith.)

in 1940 when Mr. Jirik and Mr. Seivers were in your office, there was no drilling going forward as of that date, was there?

A. Let's have the question again?

(Question read back by Reporter.) [428]

A. I don't think the date Mr. Jirik and Mr. Seivers were in the office was definitely fixed, so I couldn't say.

Q. It was sometime in 1940, you did testify to that.

A. I said it was probably sometime after 1940, but I didn't recall just when it was.

Q. Would you say it was sometime in 1941?

A. It might have been in 1941, and during that period we were negotiating with Carter, and they began their operations out there.

Q. Showing you a document marked for identification as Plaintiffs' Exhibit 50, which is on the letterhead of the Montana-Dakota Utilities Company, and is addressed to the stockholders of the Montana-Dakota Utilities Company, do you recall having seen that document before, Mr. Smith?

A. Yes, I do.

Q. And as part of your duties with the Montana-Dakota Utilities Company, would you have assisted in the preparation of that report?

A. Undoubtedly I did.

Q. It has a signature that seems to be that of Mr. Heskett, is that right? A. That is correct.

Q. It seems to be a genuine instrument so far as you can see? A. Yes. [429]

(Testimony of Cecil W. Smith.)

Mr. Erickson: We now offer Plaintiffs' Exhibit 50.

Mr. Lamey: No objection.

Court: It is admitted.

(Plaintiffs' Exhibit 50 admitted in evidence.)

Q. I call your attention to the exhibit merely for the purpose of putting it in the right place in the record. The next to the last paragraph, would you read that for us, please, Mr. Smith?

A. (Reading) "It is the company's intention to defer any additional plans for oil development until Well No. 3 has been pumped for a sufficient time to definitely determine its commercial possibilities."

Q. The letter is dated May 8, 1937?

A. The letter is dated May 8, 1937.

Q. The Number 3 well you are referring to, would that have been the Smith well?

A. That is correct.

Q. During the progress of the drilling of the Carter well and of the Husky wells, were there any reports made to the interested property owners or lease holders similar to those that were made as to the Warren well to the Unit 5 people?

A. You say similar to—what was it?

Q. Maybe I had better put the question a different way. The record shows in the year 1936 and 1937, you sent letters to people interested in the Unit 5 area, telling about the drilling [430] progress in your various wells. Were any similar letters sent to people interested in 8-A and 8-B at the time the Carter well was being drilled?

(Testimony of Cecil W. Smith.)

A. I don't recall those first letters were sent to all interested parties. My recollection is they were sent to those who had displayed particular interest as to what was going on and who had inquired. I think there was a letter written to Mr. Wight, and I believe one to Cedar Creek Oil and Gas Company during that period. There may have been one or two others, but they were not generally sent out, except as they displayed interest in the progress.

Q. Would you say they had been sent to Mr. Norbeck?

A. They may have been sent to Mr. Norbeck, because he had been vitally interested in the negotiation of the first agreement.

Q. So you are now saying these letters such as Exhibit 11 and 12 were not generally circularized among people who had holdings in Unit 5?

A. I think that is correct. You will notice each one of these is a separately typewritten letter.

Q. You said that Mr. Jirik talked to you about the Carter well. Do you recall whether you sent him any information on that by way of letter?

A. No, I am sure we didn't because he came in every 30 or 60 days, and we talked progress and what was going on and the [431] effect it would have on the general development.

Q. As to the Husky well, I think your testimony was you thought you talked it over with Mr. Jirik, but you weren't sure. Is that a correct statement of your testimony?

(Testimony of Cecil W. Smith.)

A. No, I am sure we talked it over because he was coming in frequently all during that period and up until 1950 or thereabouts.

Q. Mr. Smith, I think the testimony has shown you and Mr. Jirik had been on rather friendly ground over the years, isn't that true?

A. Correct.

Q. You will recall, do you not, Mr. Jirik's operations were transferred pretty much to Texas and Oklahoma in the year 1948 or 1949?

A. Yes, I know he didn't come in as frequently as he had prior to that time, but he still dropped in every time he came through Minneapolis, I assume.

Q. Are you sure you ever discussed the Husky well with Tom Jirik? A. Yes, I am.

Q. Can you say with certainty whether you talked to him about it more than once?

A. Well, I would say it was very likely more than once.

Q. Where would those discussions have taken place? A. In my office. [432]

Q. Can you fix the approximate time?

A. No, I cannot, but it was sometime during the time the well was being drilled from 1941 into 1942.

Q. So, if Mr. Jirik were to testify that no conversation took place, he would be mistaken, is that correct? A. That is correct.

Q. Was the negotiations with Manning to result in his drilling for your account?

(Testimony of Cecil W. Smith.)

A. No, Mr. Manning was trying to interest various parties in taking over the drilling operations and development on the Cedar Creek Anticline.

Q. Before the recess, there was some discussion about the unitization of the Eagle sands and what transpired between you and the Cedar Creek Oil and Gas with relation to that. During the recess, we have secured these two instruments, Plaintiffs' Exhibit 51 and 52, and I will have you examine those, please. You are familiar with both of those documents? A. Yes.

Q. One of them, the yellow one, seems to be a carbon copy of a letter sent to you, and the other your reply, is that correct? A. That is correct.

Mr. Lamey: Do you offer them?

Mr. Erickson: Yes.

Mr. Lamey: No objection to 51 and 52. [433]

Court: Admitted.

(Plaintiffs' Exhibits 51 and 52 admitted in evidence.)

Q. These letters being letters which finally terminated discussions concerning the Eagle sands unitization, is that correct? A. Correct.

Q. I call your attention also to Exhibit 32, which has already been admitted, and is from H. C. Smith and directed to Montana-Dakota Utilities, and I will ask you whether or not that is a letter you received that terminated the negotiations with H. C. Smith?

Mr. Lamey: Is that already in evidence?

(Testimony of Cecil W. Smith.)

Mr. Erickson: Yes.

Q. Is that the final step in those negotiations, Mr. Smith?

A. I didn't remember the letter. I think it is.

Q. There have been admitted in evidence Exhibits 30 and 31, the one letter being from Mr. Smith entitled "Cancellation Notice," and the other your letter in response. Do you recognize that correspondence as I have described it? A. Yes.

Q. Now, as a result of receiving the letter entitled "Cancellation Notice," did you do anything by way of initiating drilling or testing on Unit No. 5? A. What drilling or testing do you mean?

Q. Any drilling or testing.

A. I don't believe so. [434]

Q. So that nothing was done or has been done on Unit 5 insofar as actual drilling or testing since the Warren well, is that correct?

A. You are referring to deep testing?

Q. Yes, deep testing.

A. Yes, that is correct.

Q. Do you have any correspondence with you, Mr. Smith, that would relate any of the details of the negotiations between you and the California Company? A. I don't believe I do.

Q. Do you know whether there was any correspondence?

A. I think there was correspondence, and as Mr. Davies testified, there was considerable verbal negotiation in connection with that.

(Testimony of Cecil W. Smith.)

Q. Do you know where their seismic testing took place?

A. It took place in Unit 8. We had furnished the seismic geophysical that we had made, and they make a check on that in Unit No. 8 to see whether their testing agreed with ours.

Q. Yesterday on the stand you were asked questions which had to do with Mr. Wight's testimony as to conversations he was supposed to have had with you in your office in 1937 and 1938, and you indicated that your relations with Mr. Wight at that time were such that he would not have come into your office. Is that a fair statement of your testimony?

A. I don't think I tried to testify as to Mr. Wight's [435] intention. My testimony was to the effect that I did not recall that he was in the office at any time during that period of time, and the relations were such that I didn't think the conversations he related took place.

Q. What did you mean by that, Mr. Smith?

A. That we would have a series of discussions in connection with the abandonment of our operations, because at the time we were negotiating for additional drilling.

Q. So that it isn't your testimony that there was something by reason of your personal relationship with Mr. Wight that would make it improbable that he would come into your office, is that a fair statement?

(Testimony of Cecil W. Smith.)

A. I say I can't testify they were such as would make it improbable he would come in the office.

Q. What did you mean?

A. I meant under the conditions, I didn't think it was likely he would.

Q. Do you suppose he would have been in the office on any other matter beside the Warren well?

A. I don't think so.

Q. And why would it not be likely that Mr. Wight would be concerned and come down to see you after the Warren well was abandoned?

A. Well, he did not come down, so I can't testify as to why it would be unlikely. [436]

Q. You did testify that yesterday.

A. I testified he was not in the office and that there were no such conversations.

Q. But you also testified that something occurred after 1935 which would make it unlikely that Mr. Wight would come down to your office.

A. I don't recall that was just the language.

Q. That may not be. I would like to know now what you did mean?

A. I thought that in view of the litigation that was pending it was not probable he would come in the office to discuss these matters, and there were no such discussions according to my recollection.

Q. As to the Warren well, there was no litigation pending between you and Mr. Wight, or your firm and Mr. Wight's group at that time, was there?

(Testimony of Cecil W. Smith.)

A. No, not as to the Warren well or as to the Fidelity agreements.

Q. Now, referring again to the litigation, I think the record already shows at the time the various agreements were negotiated, there was then pending litigation, that is true, is it not?

A. That is correct.

Q. Was there something that occurred after 1935 and before 1937 with relation to this litigation that would change your [437] personal relationships with Mr. Wight?

A. Let's hear that question again?

(Question read back by Reporter.)

A. No, I don't recall that there was.

Q. And you say now that during the years 1937 and 1938, Mr. Wight was not in your office for any purpose?

A. Yes.

Q. I call your attention to certain negotiations that were going on between you and Mr. Wight concerning the Bowdoin field. Do you recall those negotiations?

A. No, I don't recall there was any negotiations with respect to the Bowdoin field.

Q. Do you recall any conversations or discussions between you and Mr. Wight in 1937 and 1938 concerning the Archer lease?

A. No, I don't think I ever discussed the Archer lease with him.

Q. Do you recall writing him about the Archer lease?

A. I might have written, as he did inquire.

(Testimony of Cecil W. Smith.)

Q. Do you recall whether during 1937 and 1938, there were discussions and correspondence between you and Mr. Wight, rather voluminous in volume dealing with the manner of payment for gas and keeping leases up and various other things?

A. I don't recall it now; it is entirely possible.

Q. I show you a letter marked for identification as Plaintiffs' Exhibit 53, and ask you if you have seen that before? [438]

A. Yes.

Q. Do you recognize that instrument?

A. Yes, I do.

Q. And that is on the letterhead of the Montana-Dakota Utilities Company, is it not?

A. That is correct.

Q. It bears your signature?

A. Correct.

Q. In the last paragraph, the letter being dated December 14, 1938—

Mr. Lamey: May I see it. I don't think it is in evidence yet, counsel.

Mr. Erickson: I am sorry.

Mr. Lamey: No objection.

Mr. Erickson: We offer Exhibit 53.

Court: Admitted without objection.

(Plaintiffs' Exhibit 53 admitted in evidence.)

Q. Calling your attention to the first sentence in the last paragraph, which reads "Confirming our conversation with Mr. John Wight when he was in the office—" Do you know to what that referred?

A. I think that referred to a visit that he had made a few days previously, I am not just sure

(Testimony of Cecil W. Smith.)

when it was. I would call attention to the fact the letter is dated December 14, 1938.

Q. You have attorneys to call my attention to that. I would [439] like to have an answer to my question, and the record already shows the date of it, but you do recall after having read this now that Mr. Wight was in your office in 1938?

A. That is the only recollection I have of it is that letter.

Q. But this is your letter, is it not?

A. That is correct.

Q. Now, are you still prepared to testify that Mr. Wight was not in your office in 1938 in the light of your letter?

A. I believe the date we are talking about is sometime in March, 1938.

Q. I just asked about 1938, now, Mr. Smith.

A. I was testifying as to the dates between March, 1937 and March, 1938. The occasion for this letter was that there had been a unit plan filed sometime in 1938 and he was inquiring about the renewal permits in the Bowdoin field at that time.

Q. Now, I will show you a series of letters with the first dated July 10, 1937, and the last November 28, 1938, marked as Plaintiffs' Exhibit 54, all of them being on the letterhead of Montana-Dakota Utilities Company and bearing your signature, and ask you if they look to be genuine?

Mr. Lamey: May it please the Court and counsel, we have one witness, Mr. R. M. Heskett, I think will take but a few minutes. He would like to get

(Testimony of Cecil W. Smith.)

back to Minneapolis on this noon train. If it is agreeable to counsel, we might suspend with Mr. Smith and call Mr. Heskett. [440]

Mr. Erickson: I am sure that will be agreeable, we have no objection.

Court: You may step down, Mr. Smith.

(Witness temporarily excused.)

R. M. HESKETT

called as a witness on behalf of defendants, being first duly sworn, testified as follows:

Direct Examination

Mr. Lamey: Mr. Heskett has called my attention to the fact he is going on a plane rather than the train. I would like to get him out of the way.

Q. Is your name R. M. Heskett?

A. Yes, sir.

Q. And do you live in Minneapolis, Minnesota?

A. Yes, sir.

Q. At the present time, what is your position, or what office do you hold with the Montana-Dakota Utilities Company?

A. Chairman of the Board.

Q. How long have you been Chairman of the Board?

A. About a year and a half, I believe.

Q. And prior to that, what office had you held with Montana-Dakota Utilities?

A. I have been President several years, and before that I was [441] Vice President.

(Testimony of R. M. Heskett.)

Q. Had that relationship in one office or another extended throughout the life of M.D.U.?

A. Yes, sir.

Q. Mr. Heskett, Mr. Jirik has testified to the effect that late in 1937, he talked with you at your office in Minneapolis, and at that time you told him that Fidelity was all through with drilling for oil. Did you, at that time, or any other time, make that statement or a statement to that effect to Mr. Thomas Jirik?

A. I did not.

Q. Did you, at that time, or at any other time, state to Mr. Jirik that Fidelity was all through drilling for oil and that it had given up its program for the development of oil in the Cedar Creek Anticline?

A. I did not.

Q. Mr. John Wight has testified to the effect that he talked with you on several occasions, perhaps three or four, in 1937 and 1938, at your offices in the Montana-Dakota Utilities Company in Minneapolis, and that you told him you were through drilling for oil, that you were not going to do any more development as far as oil was concerned. Did you, during the time stated, or at any other time, make such statement, or statements to that effect?

A. I did not. [442]

Mr. Lamey: You may cross examine.

Cross Examination

Q. (By Mr. Erickson): Mr. Heskett, can you tell us who the President of Fidelity Gas is?

A. Mr. Wilbur Hayes.

(Testimony of R. M. Heskett.)

Q. During the period of the years 1937 and 1938, can you tell me whether Tom Jirik stopped occasionally in your offices in Minneapolis?

A. I don't recall the year, but he has been in our office very frequently for a long time.

Q. And your relations with Mr. Jirik have been friendly, have they not? A. Yes.

Q. And would you say there have been many visits between you and Mr. Jirik in your offices?

A. Yes, I would say quite a few.

Q. Would that go back to the period 1936, 1937 and 1938?

A. Well, I am not sure of the date when his calls started, but it is quite likely.

Q. Do you know Mr. George Seivers?

A. I don't remember him.

Q. The gentleman who testified here who is Secretary of the Cedar Creek Oil and Gas Company.

A. I didn't hear him testify.

Q. Do you recall Mr. Seivers ever being in your office with Mr. Jirik? A. No, I don't.

Q. As to Mr. Wight, can you say what your relationship with Mr. Wight was during the earlier years, 1935, 1936, 1937 and 1938?

A. Well, at that time he had a number of lawsuits against us, so I would say we weren't very friendly.

Q. Would you say during that period he was ever in your office at all?

A. I don't remember of his being in at all during that period.

(Testimony of R. M. Heskett.)

Q. Do you remember any occasion when Mr. Wight was out at your home? A. No, I do not.

Q. Mr. Heskett, in these various matters dealing with the Fidelity gas operation, can you say whether or not Mr. Smith has been the man more immediately in charge of those operations?

A. That is correct, yes, sir.

Q. You yourself at the time of the drilling of the Warren well and the N.P. well and the Smith well took a very active interest in them, did you not? A. Yes.

Q. You were in the field yourself? [444]

A. Yes.

Mr. Erickson: That is all we have.

Mr. Lamey: That is all, Mr. Heskett. May Mr. Heskett be excused.

Mr. Erickson: Yes. At the same time I would like to have it agreed, and counsel has agreed, that Mr. Seivers be excused. Mr. Seivers is going on the Northern Pacific.

Court: Very well, Mr. Seivers and Mr. Heskett are permanently excused.

(Witness excused.)

CECIL W. SMITH

recalled as a witness on behalf of defendants, having previously been sworn, testified as follows:

Cross Examination—(Continued)

Q. (By Mr. Erickson): Now, calling your attention to this proposed Exhibit 54, will you say whether or not those represent original letters

(Testimony of Cecil W. Smith.)

signed by you and on Montana-Dakota Utilities' letterheads? A. They do.

Q. They deal with various subjects including the Archer well and the Bowdoin negotiations, do they not?

A. I didn't see one in there on the Archer well.

Q. There is one in there, and I'll find it for you—Armstrong.

A. Yes, there was correspondence in regard to the Armstrong [445] well.

Mr. Lamey: What is the purpose, to show there was correspondence?

Mr. Erickson: The purpose is we have run into a situation where witnesses have testified yes and no, and the matter of the credibility of the witnesses, and the matter of their memories and various other things are here involved. These letters merely show a course of business dealings between these two gentlemen during the period of 1937 and 1938 to show their relationship, and also the matter of whether or not it is likely Mr. Wight might have been in Mr. Smith's office during that period.

Court: Do they show he was in the office?

Mr. Erickson: There is one.

Court: Yes.

Mr. Erickson: No, these letters show there were business transactions, and that as a result of business, he might have been in. The impression that Mr. Smith left on me yesterday, and I believe the record shows it, is that the relationship between he and Mr. Wight was so unfriendly during the period

(Testimony of Cecil W. Smith.)

that Mr. Wight would not have had the audacity to come in the office, and Mr. Heskett bore that out by saying the relations were unfriendly with Wight, and Wight would not have been likely to come in their office, and these letters show business dealings and refute any inference or suggestion that might be [446] in their testimony.

Mr. Lamey: Will you put them all in?

Mr. Erickson: As one exhibit, we offer them.

Mr. Lamey: We object as incompetent, irrelevant and immaterial, that the contents of these letters go into evidence. We have no objection to counsel developing the circumstances on which the letters were written, but I think the letters themselves are incompetent.

Court: It is for the limited purpose of showing business relations, but not to prove or disprove any particulars referred to in the letters?

Mr. Erickson: No, and there is no reference in those letters to anything involved in this litigation, and they couldn't be the basis for us trying to expand the issues or having any effect or bearing on the case at all.

Court: The objection is overruled, and they are admitted.

(Plaintiffs' Exhibit 54 admitted in evidence.)

Q. The testimony of both Mr. Wight and Mr. Jirik was to the effect, and they purported to quote you, that you had been subject to criticism by the stockholders of the Montana-Dakota Utilities Company because of the expenditures being made on oil

(Testimony of Cecil W. Smith.)

development, and, as I believe you have already testified, you had no conversation with Mr. Wight at all. You have also testified that you did not make that statement to Mr. Jirik, is that true? [447]

A. Correct.

Q. Can you tell us whether there was any criticism from your stockholders because of the activity in the oil development at that time?

A. There was not.

Q. Was there any discussion?

A. No, there was not.

Q. But you have testified that the money being spent was actually Montana-Dakota Utilities Company money, is that correct?

A. That is correct.

Q. The conversation between you and Jirik and Seivers, the date of which there is still some uncertainty about, but probably taking place sometime in 1940, can you tell us what that conversation was?

A. Well, as I recall the conversation that we had that day, we had drilled an Eagle sand well prior to the conversation on their lease, and they came up to discuss the possibility of having further drilling done to the Eagle sand on their lease. That was my recollection of what the conversation was about.

Q. And their testimony is to the same effect to that extent, they said that also was a matter of discussion, but insofar as the further statement of Mr. Jirik and Mr. Seivers that you said in effect as to oil, you were all through, they are [448] wrong on that, is that correct?

(Testimony of Cecil W. Smith.)

A. They are not only wrong on that, but they were wrong on the date.

Q. Why were they wrong on the date?

A. It was after 1940.

Q. Why are you sure of that?

A. Because the first Eagle sand well completed on their lease was completed in 1940.

Q. As to that particular statement, you say they were wrong, is that true? A. Correct.

Q. And that no such statement was made?

A. That is correct.

Q. Mr. Smith, did you have any conversation with your bankers about 1937 about whether they would approve continued drilling to the deeper sands? A. No.

Q. And no such conversation took place?

A. No.

Q. At a later date? A. No.

Q. Ever? A. No.

Q. Now, Mr. Jirik has testified that in conversations that [449] he held with you alone in your office earlier than this conversation in which the three of you participated, whatever its date, that you said you were abandoning all your oil operations in Montana, you heard that testimony? A. I did.

Q. That is incorrect?

A. That is incorrect.

Q. There was no such conversation?

A. There was no such conversation.

Q. At any time?

A. At any time.

(Testimony of Cecil W. Smith.)

Q. And you heard him testify that you told him that Montana-Dakota Utilities Company was a public utility and not an oil wild catting outfit, and for that reason you were through?

A. I don't recall any such conversation with him. As a matter of fact, during the period you are talking about, we were negotiating with the California Company to carry on drilling, so that it would be entirely unreasonable that I would make any such statement to him as that.

Q. When did you start negotiations with the California Company? A. 1935.

Q. And you tell me your negotiations with California had to do with Unit 8, is that correct?

A. No, they had to do with the entire structure. [450]

Q. Those negotiations were continuing during the years 1937 and 1938?

A. Up until January, 1939.

Q. But in fact, at the time Mr. Jirik says he was in there in 1937 or 1938, you had quit entirely on your own drilling program, is that correct?

A. We had quit our drilling program, and as I recall, we were still testing and pumping on the Smith well until the middle of 1938 to determine just what it would do.

Q. But as of the time when he says he was in your office, when conversations between the two of you were going on in 1938, there was no drilling in Unit 5? A. That is correct.

Q. You had determined then you were not going

(Testimony of Cecil W. Smith.)

to do any more drilling on Unit 5 on your own account? A. I think that's right.

Q. So that as to the conversation reported by Mr. Jirik in which the matter of you being a public utility, that conversation just didn't occur, is that correct?

A. I just don't recall any such conversation. I am sure it didn't take place.

Q. Mr. H. C. Smith testified that there had been no discussion of the Shell agreement when you bought his Judith sands. You heard that testimony?

A. Yes. [451]

Q. He is in error in that statement?

A. That is correct.

Q. And his statement does not square with the fact? A. That is correct.

Q. How many times did you see Mr. Haney?

A. I believe twice.

Q. Do you recall that one of the times you saw Mr. Haney was at his home, and he was quite ill?

A. He was at home both times, and I believe the first time we went out there, they said he had a heart attack and we could only talk a certain period because his health was poor.

Q. That discussion was short, was it not?

A. I think it lasted about an hour and a half or two hours, somewhere along in there.

Q. Was it that conversation in which you say the deeper sands were discussed with relation to the Shell agreement? A. Yes.

(Testimony of Cecil W. Smith.)

Q. When Mr. Haney testified no such conversation took place, he is wrong?

Mr. Johnson: Just a minute, he didn't so testify.

Q. I am sorry. When Mr. Haney testified when you were negotiating the purchase of the Judith sands that he was assured the purchase would have no effect on the lower sands, can you say whether that conversation took place?

A. We had a long discussion with respect to the Fidelity [452] operating agreement, the gas purchase contract, and the unit plan, and as I recall, in the discussion we told him that the sale of the Judith River sand to us was not going to affect the maintenance of the lease with respect to the rest of his rights as he had them under those agreements.

Q. And did you say there was a further discussion of the Shell agreement?

A. Yes, a very complete discussion because they wanted to know what the effect of the making of the Shell agreement would be on the Fidelity operating agreement, and what effect it had on their interests.

Q. As to the purchase agreement to which we have just referred under which Haney sold you his interests in the Judith sands, which is Exhibit 24, that was prepared by you, was it not, or by somebody under your direction?

A. It was prepared by us, and it was sent to them for their approval.

Q. But the language that appears in it and all

(Testimony of Cecil W. Smith.)

through it, was language that was supplied by you, is that correct?

A. In the first part, yes. I don't know what corrections were made during the period of discussion.

Q. But the actual drafting was done by you?

A. Yes.

Court: Court will stand in recess until two o'clock.

(Noon recess.) [453]

Mr. Erickson: We have no further cross examination.

Mr. Johnson: If the Court please, we have had marked as Defendants' Exhibits 55, 56 and 57, photostats of three documents, one being an assignment from George and Jane Norbeck to Atlantic and Pacific Oil Company, that is 55; 56 is an assignment from Atlantic and Pacific Oil Company to Cecil W. Smith; and 57 is an approval of the assignment, dated July 1, 1954, by the Chief of the Branch of Leasing, Division of Minerals, United States Department of Interior. These show the interest of Mr. Cecil W. Smith in one of the parcels of land in which there is evidence that the plaintiff, Susan Wight also has an interest. We offer these under stipulation of counsel that photostats may be introduced in lieu of originals.

Mr. Erickson: That is correct, but I do object to their admission on the ground they are incompetent, irrelevant and immaterial, outside the issues of the case.

Mr. Johnson: We offer them, your Honor, for

(Testimony of Cecil W. Smith.)

the purpose of showing that with respect to this particular parcel there is undivided ownerships, but we have persons of whom Susan Wight is one, and Mr. Smith is another. The parcels are subject to the Fidelity operating agreement, and we felt we would like the record to show the divergence of ownership because of that circumstance.

Mr. Erickson: I would add to my objection that Mr. Cecil [454] Smith, in whose name these appear, is not a party to the action.

Court: Yes, I don't see their materiality myself. If you think they amount to something, I can't see it, but I will be glad to reserve my ruling on it and let you argue the matter in your brief.

Mr. Johnson: That is satisfactory. We merely wanted them in to——

Court: I don't see what they can do.

Mr. Erickson: That is satisfactory to us. We don't feel the necessity of introducing any counter-proof on the matter.

Redirect Examination

Q. (By Mr. Lamey): Mr. Smith, during your cross examination, Mr. Erickson questioned you with reference to compensatory royalty understandings or agreements with some of the Wight group in this Unit 5. Do you recall that? A. I do.

Q. Do you know, if you understand, with reference to at least the Capital Gas lands which were involved and part of the lands in this suit, whether or not they were the subject of an agreement with

(Testimony of Cecil W. Smith.)

reference to compensatory royalties on or about the date of the meeting at Billings with the U.S.G.S.?

A. Yes, they were subject to agreements.

(Defendants' Exhibits 55, 56 and 57 admitted on reserved ruling.) [455]

Q. We show you Exhibits 58 and 59, and ask you to examine them and tell me whether or not you can identify them as the agreements to which you have just referred?

A. Yes, I have examined Exhibits 58 and 59, and they are the agreements to which I have referred.

Q. And with whom?

A. Exhibit 58 is a letter agreement from Capital Gas Corporation to Gas Development Company, authorizing the purchase of gas from lands which they controlled in Unit No. 5; Exhibit 59 is a letter agreement from the Capital Gas Corporation authorizing the purchase of excess gas above the amount which would be available to them under the unit plan for the purpose of reimbursing the government for the amount of compensatory royalties then due.

Mr. Erickson: I will object to the exhibits because they deal with lands not covered in this litigation.

Mr. Johnson: They are lands within Unit 5.

Mr. Erickson: They are lands within Unit 5, but they are not lands involved in this litigation.

Court: Well, this is in rebuttal, at least to the inference drawn from counsel's questions to the

(Testimony of Cecil W. Smith.)

effect that no such arrangements had been made. With reference to the other——

Mr. Lamey: That's right, we had that testimony on cross examination, and I merely want to demonstrate the type of agreement that was made. Were these the only agreements made, [456] Mr. Smith?

A. There was a similar agreement executed by George Norbeck covering lands included in the permit which he held at the time also.

Court: I will overrule the objection.

(Defendants' Exhibits 58 and 59 admitted in evidence.)

Q. Mr. Smith, in connection with the agreement with Carter Oil Company for the drilling of a well in the Little Beaver area, I believe either on or about that same date, you made another agreement which has been introduced in evidence here with reference to an option on the balance of the acreage of Fidelity in the Cedar Creek Anticline?

A. Yes, there was an additional agreement made.

Q. I show you Defendants' Exhibit 44, and ask you if that is the supplemental agreement covering the lands on all of the other units in the Cedar Creek Anticline?

A. Yes, that is the supplemental agreement that covers lands in Units 1 to 7, inclusive.

Q. Now, in connection with the Husky agreement and the drilling of its well, did you have a letter agreement with reference to the lands in which that company, Fidelity, or Montana-Dakota Utilities were interested in Units 1 to 7 of the Cedar

(Testimony of Cecil W. Smith.)

Creek Anticline? I show you now Defendants' Exhibit 47, and ask you if that is the letter agreement?

A. Yes, that is a letter agreement with the Husky Refining [457] Company covering the lands in which Fidelity had an interest in Units 1 to 7, inclusive.

Q. In your cross examination there was some questions with reference to the percentage of the area within the unitized portion of the Cedar Creek Anticline being covered by the Fidelity operating agreement, do you recall that? A. Yes.

Q. And then, if I understood one of the subsequent questions, I believe, under that same reference of 90 percent, there was much made of the gas unit agreement, and I would like to have you state now just what the situation is as to the area in the unitized portions of the Cedar Creek Anticline covered by this Fidelity operating agreement?

A. I believe I testified on direct that approximately 90 percent of the unitized area in the Cedar Creek Anticline was covered by the deep test operating agreements with Fidelity Gas Company.

Q. And that is the fact, is it not?

A. That is correct.

Q. Now, when you were negotiating the agreement for the purchase of the gas from Smith and Haney, I believe, in May of 1952, you spoke of some changes that may have been suggested by at least Mr. Smith or someone on the other side of that negotiation. Were any of these changes made in the office of Attorney Prudohn? [458]

(Testimony of Cecil W. Smith.)

Mr. Erickson: May I have the question read?

(Question read back by Reporter.)

Mr. Erickson: No objection.

A. Yes, I think there were. I believe that there was discussions in Mr. Prudohn's office as to changes in the agreement that had been suggested to him, and the suggestions were worked out and agreed to there.

Q. Mr. Prudohn was an attorney, was he not?

A. Yes.

Q. And whom was he representing in these negotiations?

A. He was representing H. C. Smith.

Mr. Lamey: That is all.

Recross Examination

Q. (By Mr. Erickson): Mr. Smith, when you say you believe it was discussed in Prudohn's office, was there discussion, or wasn't there?

A. There was discussion.

Q. And were there changes made?

A. I think there were.

Q. Well, are you sure there were?

A. Yes.

Q. Can you tell us what those changes were?

A. No, I can't tell you at this time because I don't recall just what the discussion was about.

Q. Do you recall whether it was necessary to have the contract retyped as a result of those discussions?

A. I believe it was retyped following those dis-

(Testimony of Cecil W. Smith.)

cussions, and it was subsequently sent to Mr. Prudohn for execution.

Q. It wasn't retyped then and there, is that correct? A. That is my recollection.

Q. Can you tell us from looking at the Exhibit 29, which bears execution date of June 12, 1952, what changes were made as a result?

A. No, I cannot.

Q. What was the date you were in Mr. Prudohn's office?

A. I don't recall; it was sometime early in May.

Q. With relation to the Capital Gas lands that are in the Exhibits 58 and 59, none of those lands are now in the ownership of these plaintiffs, are they? A. I believe not.

Q. And who owns this Capital Gas land now?

A. I believe that Montana-Dakota Utilities Company owns it.

Mr. Erickson: That is all.

Mr. Lamey: That is all.

(Witness excused.) [460]

WINSTON COX

called as a witness on behalf of defendants, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Lamey): Your name is Winston Cox? A. Yes, sir.

Q. Do you live in Billings, Montana?

A. Yes, sir.

(Testimony of Winston Cox.)

Q. How long have you lived here?

A. 12 years.

Q. What is your business?

A. I am an oil and gas lease broker.

Q. And how long have you been engaged in that business?

A. About 15 years.

Q. Will you tell us briefly what that business consists of generally?

A. Well, primarily I am what you would call a custom broker, and I take buying orders for a company and go into a prescribed area to buy leases for a certain price. Probably, oh, between 25 percent and 40 percent of my business is buying and selling leases on my own account.

Q. And prior to engaging in that business in Billings, had you been previously engaged elsewhere in the same business?

A. For three years in Bismark, North Dakota.

Q. And during the period particularly since discovery of oil by Amerada in May of 1951 near Williston, North Dakota, have you been more or less familiar with the oil and gas leasing and brokerage business in Eastern Montana?

A. Yes, I have.

Q. Are you familiar with an area known as Cedar Creek Anticline, and which is set forth in the two U.S.G.S. maps on the wall, marked Exhibit 1 and 1-A?

A. Yes, I am.

Q. Do you recall the discovery of oil at Ritchie, Montana, on or about July, 1951?

A. Very well.

(Testimony of Winston Cox.)

Q. And did you know about the discovery of oil by Shell in the Pine Unit in the Cedar Creek Anticline on or about the month of October, 1951?

A. Yes.

Q. And did you know about the discovery of oil by Shell in the Little Beaver area in the Cedar Creek Anticline in about June, 1952? A. Yes.

Q. Now, prior to 1951, have you had some occasion to investigate and deal in oil and gas properties in the Cedar Creek Anticline?

A. About that time I became interested.

Q. Do you know what the average price was for acreage in the [462] Cedar Creek Anticline during 1950?

Mr. Erickson: To which we will object on the ground it is immaterial, irrelevant and outside the issues of this case.

Mr. Lamey: Your Honor, it is in connection with our defense of estoppel. We have alleged there has been a great increase in values of mineral land. As a matter of fact, I think plaintiffs have also made similar allegations.

Court: Overruled.

Mr. Lamey: I am merely laying a background to bring it down to subsequent events.

Court: Overruled.

A. I would like to have the question read.

(Question read back by Reporter.)

A. Well, actually, there probably hadn't been a market developed at that time, there was so little interest in the area, at least from my end of it. At

(Testimony of Winston Cox.)

that time there was considerable acreage on the anticline, or immediately adjacent to it, which was still available for filing, that is, Federal acreage that you could acquire for 50 cents per acre.

Q. Did you during that year of 1950 acquire some such acreage? A. Yes.

Q. Now, what was the situation on or about July 24, 1950, in the Pine Unit with reference to ability to acquire acreage at a price? [463]

Mr. Erickson: We would object to that on the ground it couldn't be material. The Pine Unit is not Unit 5.

Mr. Lamey: I'll lay a foundation for that.

Q. Generally in the year 1950, and until there was a discovery in the Pine Unit and in Little Beaver, was there any particular variance between the value of leases up and down the Cedar Creek Anticline from the Pine to Little Beaver?

A. No, I would say there was no particular hot spot.

Q. On or about July 24, 1950, did you have occasion to purchase a lease on Section 28, Township 12 North, Range 57 East, in the Pine Unit?

A. What was that date, please?

Q. It is July 24, 1950. Do you have any memorandum?

A. May I refer to my notes? That was when I disposed of that lease. I had owned it about a year previous to that.

Q. You disposed of it then at what price?

(Testimony of Winston Cox.)

A. Two dollars——

Mr. Erickson: To which we will object on the ground and for the reason it is incompetent and irrelevant. May I point out it deals with a specific piece of property, and in an area which is 30 miles from the Unit 5, and could not be used to prove the value or anything else.

Court: There has been evidence that this is one structure, and this witness has said there was no difference in the prices in one unit from the other, and its distance from the [464] particular lands involved here would be something the Court would take into consideration in weighing what the effect of the evidence is worth, but the objection is overruled.

Mr. Erickson: May I make the further objection that to pick an isolated tract and have the price on it without anything further that that was a typical price could not possibly serve to prove value.

Court: I think it is not, the particular sale is not used to establish the price, but as background and illustrative of his experience in the area. In other words, market price is not proved by a particular sale, but when the witness has testified with reference to the general market there, then his particular experience may be used to substantiate his opinion with reference to the general market, but the particular price is no proof of market.

Mr. Erickson: I would say, then, there would be the further objection here for lack of foundation.

(Testimony of Winston Cox.)

I am willing to agree Mr. Cox has been in the business, but whether he dealt extensively in 1950 in these particular leases doesn't appear.

Court: Very well.

Q. Mr. Cox, during the year 1950, was there very much dealing in acreage on the Cedar Creek Anticline?

A. To tell what happened then, that was the year that Charles Edmudson and a group of fellows took a big spread of [465] acreage up and down the entire length of the anticline where available, and there was a great deal of acreage available. It was all open. They filed on Federal lands at 25 cents per acre, with the understanding when leases were issued, they would pay an additional 25 cents per acre. Then, on this date we are now discussing, Shell, and I believe one other company, began a buying campaign on the anticline with a top of \$2.50 per acre. It was at that time I sold this one section in question, and another one, and Charles Edmudson at the same time sold a number of acres at the same price.

Q. When you refer to the anticline, do you refer to the area upon or outside the unitized portion?

A. The great majority, if not all, of the land within the unitized area was unavailable. However, at that time, we didn't think the unitized area was all there was to it. It looked like it was going to be a great large area.

Q. Tell us what the situation was from then on?

(Testimony of Winston Cox.)

This is the middle of 1950. What was the situation with reference to the value of interests in acreage on the Cedar Creek Anticline?

A. With the exception of this one buying order at \$2.50 an acre, I don't believe very much acreage changed hands.

Q. Do you know of any acreage being put up for sale by the State early in 1951 in the anticline?

A. Yes, there was acreage.

Q. About when was that? [466]

A. May I refer to my notes? The actual sale was held February 20, 1951, so the land would have been advertised for at least three weeks previous to that.

Q. Were you familiar with any of the land in the anticline that was sold at that sale?

A. Yes, I bid in the state sale on February 20, 1951, and purchased two tracts.

Q. And where were they?

A. One of them was the East half of 16, 12 North, 57, which would be the northern end of Pine. I purchased that for \$5.50 per acre; and the other was the West Half of 16, 11 North, 57 East, which would be the south end of Pine, which I purchased for \$10 per acre.

Q. What happened to prices in the anticline following the Pine discovery in the northern part of the anticline about October, late in 1951?

A. At that time, we still had some of our own acreage left, and others that I know had acreage, and we became familiar with the fact that Shell had

(Testimony of Winston Cox.)

a \$25 top in some areas to buy leases, and a \$50 top in other areas.

Q. Speaking of areas within the anticline or outside?

A. Both immediately within and immediately adjacent. They greatly enlarged the scope of their anticline in their buying order.

Q. Did those prices extend quite generally up and down the [467] anticline?

A. These specific areas, and I had them specifically, would have, oh, it would have represented an area of at least 50 to 75 thousand acres.

Q. Now, did you have occasion——

Court: That doesn't answer the question, I believe. I don't understand it.

Q. Where were those lands you have just referred to with reference to the anticline.

A. Actually, I was looking at the map the other day. This was before Cabin Creek. A portion of the outline was what is now the Cabin Creek area.

Q. Can you point that out on the map?

A. I can. Cabin Creek is here (indicating).

Q. You are now pointing to Exhibit 1, is that right?

A. Yes.

Q. The lower portion of it?

A. Yes, and these particular areas actually extended from, I would say here (indicating) probably down through the area that you are discussing, and also a paralleling trend immediately east.

Q. Now, you say from here——

(Testimony of Winston Cox.)

Mr. Erickson: May I point out that this map attaches on here (indicating).

A. Well, it would cover both areas then. [468]

Q. You first pointed, did you not, to what has been designated as the Pine area?

A. No, the Pine area would be up here (indicating). I believe in the Pine area they had the lease situation in control then, and I don't believe the map I had at that time covered the Pine area.

Q. You are referring in general then, from the area in Unit 1 down to Unit 8 in the Little Beaver, is that correct?

A. Correct. The first play on the anticline was from the Pine Unit north. Actually, the southern end of the anticline wasn't being played by fellows such as myself until a considerably later date.

Q. Now, what transpired then, or what took place with reference to values of lease interests in the area after the discovery at Pine?

A. Well, for a specific example, I went back and bid on another tract in the October 7, 1952——

Q. Was that a State sale?

A. State sale, and bid \$430 per acre for the Northeast Quarter of 16, 11, 57, which is also in Pine.

Q. Now, in February 20, 1951, had you previously purchased at a State sale the East Half of that same section, 16, for \$5.50 per acre?

A. No, I purchased the West Half of that same section for \$10 per acre. [469]

Q. Now, before the Shell discoveries at Pine and

(Testimony of Winston Cox.)

Little Beaver—strike that out. After the discovery of Pine and Little Beaver, what was the situation with reference to lands up and down the anticline, and particularly in these units 1 to 8?

A. Well, they were so closely held that there was very little trading.

Q. But as to values, were the same values reflected?

Mr. Erickson: To which we will object on the grounds the witness has said there was no market to determine the value by.

Court: That is as I understood him. Was there a market?

A. There would have been a market had there been acreage available.

Court: Yes, but if there was no acreage available, there is no market, there is no market in the accepted sense. You can go ahead and prove values in any other way.

Q. As to values, you have described a specific instance where from February 20, 1951, the value went from \$10 to a price of \$430 on October 7, 1952?

Court: Pardon me, I wonder is there any question that since the discovery of oil that the value of oil rights has increased tremendously.

Mr. Lamey: I am surprised counsel is objecting because it is something he has alleged.

Mr. Erickson: I am willing to agree values have gone up, but I wouldn't want to sit here and have

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Mr. Erickson: I am willing to agree values have gone up, but I wouldn't want to sit here and have

(Testimony of Winston Cox.)

values fixed [470] without a little more foundation on it.

Court: Well, it seemed to me, so far as that is concerned, it is not important to either of you to fix specific values, it is just the question that there has been a tremendous increase in value. I, myself, not knowing anything about it, would suppose that is what would happen.

Mr. Erickson: That's right, but we wouldn't want to admit there has been a tremendous increase. There has been some increase, yes.

Court: Well——

Mr. Erickson: I would like to comment for the record, even though the laughter doesn't appear, that my view is dictated some by the offers made for some tracts we have, so I say I know whereof I speak, there has been no tremendous increase. If a stipulation that there has been a substantial increase would be sufficient for the other side——

Court: Would that be sufficient for your purpose, a substantial increase?

Mr. Lamey: Well, we will see what we can do.

Court: Very well, proceed.

Q. Mr. Cox, you were familiar with the situation down there. Now, did I understand you to say there wasn't too much acreage that was available for sale within the units, is that correct? A. Correct.

Mr. Erickson: I would be willing to stipulate that I [471] would have no objection to this witness on the basis of his experience giving his opinion as to whether there has been an increase, and the rela-

(Testimony of Winston Cox.)

tive amount of increase. I would agree to that because I think he is qualified to say.

Mr. Johnson: Could we say from so much to so much?

Mr. Lamey: I think the witness can along the lines of the stipulation or suggestion of counsel.

Q. Mr. Cox, you just tell us in your own way what happened to values of lands along the Cedar Creek Anticline between a time prior to the discovery of the Pine and Little Beaver wells, and subsequent thereto?

A. Well, I might even say that \$430 that I paid for the state tract was not my top. I believe that then as now, if a person—we know the price was \$2.50 to start with. I believe then as now, if a person had a piece of acreage properly located, they could have gotten between three and five hundred dollars per acre for it.

Q. Would that pertain throughout the anticline pretty much?

A. Well, again, we would be in the dark what the companies would be willing to give for it. It might vary in a quarter of a mile, but I just know in two or three instances what companies were willing to let me pay for acreage. That is what I am basing that price on.

Mr. Lamey: That is all, you may cross examine.

Cross Examination

Q. (By Mr. Erickson): Mr. Cox, the property you acquired from the state, the last piece, the \$490 piece——

A. \$430 piece.

(Testimony of Winston Cox.)

Q. Whatever the figure is, is in 16, 11, 57, is that correct? A. Correct.

Q. It is a fact, is it not, that that land is within a mile of the discovery well in the Pine Unit?

A. No, it is five or six miles south.

Q. Had the well been drilled that appears on this map now, in Section 15, at the time you bid on that property?

A. No, there would have been no wells drilled in 11, 57.

Q. So, the discovery well was in the township north, is that correct? A. Correct.

Q. Now, with reference to these areas where you think you could have gotten from three to five hundred dollars if you had land available, could you still get that same price?

A. Yes, however, it depends entirely on what information the company has developed to this date. If that land was located on their hot spots, there is no question those kind of prices might prevail.

Q. Were they located on some hot spots?

A. I don't understand the question. [473]

Q. You testified, as I understood, you had in mind specific pieces of property, which if you had them available in particular areas, you could have gotten three to five hundred dollars for. Could you still get the same price for those same acreages in the same areas?

A. If drilling has not condemned it.

Q. Do you know whether drilling has condemned it?

(Testimony of Winston Cox.)

A. I had no particular tracts of land in mind. I am speaking of areas, not tracts of land.

Q. The areas where you could have gotten that price, where were they?

A. Immediately adjacent to the Cabin Creek discovery, and in the Pine area.

Q. Were any of those areas down in Unit 5?

A. I am not that familiar with Unit 5.

Q. Do you know of the drilling of the Stanolind well, I think it was completed last year, in Unit 4, which is the area below or just opposite it towards Cabin Creek in this approximate location (indicating), do you know the drilling of that well?

A. Yes.

Q. Do you know what the result of that drilling was?

A. Dry hole.

Q. Do you know of the recent completion of the McDonald well?

A. A dry hole. [474]

Q. That is in the same township and range, is it not?

A. I believe that is in the township north.

Q. Anyway, it is in the general area south of the Cabin Creek well?

A. It is east.

Q. Is it more east or south?

A. It is east.

Q. Now, with relation to the values of lands in the general area of these two dry wells, and based on your experience, in your opinion, would two dry wells have an effect upon the value of the leases of the properties adjacent thereto?

A. Very much so.

Q. What would that effect be?

(Testimony of Winston Cox.)

A. Well, as far as I personally am concerned, knowing a little about the area, I wouldn't probably pay anything for leases in there.

Q. Would it have any effect, the discovery or the drilling of these two dry holes, would that, as a result of your experience, have any effect on the values of lands in Unit No. 5, which starts about four miles south?

A. They definitely would after you get off the crest of the anticline. I think it has been established it is going to be long and narrow, and if you get east or west of the top of it, prices are going to definitely vary greatly.

Q. As a result of drilling those wells? [475]

A. Those and others like them.

Q. Look at the map, 1-A, and it has been established by some other witnesses that these closed circles are the crest of the anticline, is that your understanding? A. I think that is correct.

Q. So that with relation to this map, you can see there are considerable acreages not included within closed circles, is that correct?

A. I think that would be correct.

Q. As a result of drilling the two wells to which we referred and which were off the top of the structure, what would you have to say as to the effect of the drillings on the value of lands in Unit 5 not on top of the structure?

A. They would be reduced in value.

Q. Do you have any idea now as to what the present value is of lands in Unit 5?

(Testimony of Winston Cox.)

A. What it would be to me and what it would be to someone with geological information would vary from \$5 to \$500 per acre. I have no geological information.

Q. You don't know of the present market value of lands in Unit 5, is that correct?

A. Well, if I were spending my own money, I know what I would be willing to pay for some of it, and I wouldn't be nearly as interested in others of it, but as I say, it would be a guess because of past performance on the anticline as far [476] as that is concerned.

Q. Would you be willing to pay as much now as you would have been a year ago?

A. For a piece or two of that, I would be willing to pay more.

Q. Would you be giving away any secrets if you indicated which pieces those were?

A. I don't know about this particular acreage, but I would want to be on top of the crest of the anticline.

Court: Does the fact that the lands are unitized have any effect upon their value?

Witness: Are you asking me?

Court: Yes.

A. Not to the companies holding leases, I don't believe. It would to me as a mineral purchaser or royalty purchaser, but I can see no reason for the company holding them why they would decrease in value.

(Testimony of Winston Cox.)

Q. Is that assuming the company holding the unitized area was the operator?

A. I don't believe I follow you.

Q. Well, suppose Unit 5 were held by Stanolind, for example, as the unit operator and it had the majority of the acreage, would that have reduced the value to Shell if they were——

Mr. Lamey: Would it be unitized for gas or oil?

Mr. Erickson: The question was suggested by his Honor. [477]

Mr. Lamey: I think the witness should be made aware if you are tying it into this case, it should be unitized for gas.

Q. Assume it was unitized for gas.

A. I don't see where it would affect it very well.

Mr. Erickson: Does that sufficiently answer it, your Honor?

Court: I suppose so, I don't know what I was finding out. I wanted to show I knew as little about it as a lot of other people.

Q. It is pretty hard to generalize as to the value of large blocks of land for leasing purposes, isn't that true?

A. That is true.

Q. There may be lands in one section worth several hundred dollars an acre, and other lands adjacent to them practically without value, isn't that correct?

A. For the people having the geological information, that is true.

Q. I believe you have testified insofar as Unit 5 is concerned, considering all lands in Unit 5, they

(Testimony of Winston Cox.)

would on the average be of considerably less value now than a year ago. Would that be a fair statement of your views?

A. No, in view of the Monoco discovery, for these people without information, it has probably more or less cancelled the information we thought we had gotten from the Stanolind [478] and McDonald wells.

Q. And the Monoco well is the well just to the east of Unit 5, is that correct?

A. No, it would be in 7 North.

Q. And it is 60 East?

A. No, 61, immediately across the line.

Q. It is a distance of some eight or nine miles from the nearest point in Unit 5, is that correct?

A. Probably so, yes.

Mr. Erickson: That is all.

Mr. Lamey: That is all.

(Witness excused.)

T. R. BARNES

called as witness on behalf of defendants, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Lamey): Will you state your name?

A. T. R. Barnes.

Q. And where do you live?

A. At various parts; I am on the New York staff of the Shell Company on special assignment,

Q. Have you lived in Billings?

(Testimony of T. R. Barnes.)

A. I lived about a little over five years in Billings. [479]

Q. What is your profession?

A. I am an engineer and geologist.

Q. And what is your title, if you have one, with Shell?

A. Well, at the present time I am classified as Senior Geologist.

Q. Do you hold some degrees in geology and mining?

A. I have a degree in Engineering from Stanford University in 1926, and a degree of Petroleum Engineer in 1928.

Q. After finishing the University, what did you do in the way of carrying on your profession?

A. Immediately after graduating and getting my advanced degree, I was instructor in Geology for one summer, and then I was geologist and engineer for Honolulu Oil Corporation until 1931, or 1931. From 1931 to 1935, I worked at various operations in the oil fields, the latter part of which was directional drilling and well surveying, and I went to work for the Shell Company in 1935 as a petroleum engineer.

Mr. Erickson: I would stipulate his qualifications, Mr. Lamey.

Q. And have you worked for the Shell Oil Company then since 1935?

A. I have, as a petroleum engineer and geologist.

(Testimony of T. R. Barnes.)

Q. What has been your experience in your profession in Montana?

A. I started studying Montana, and particularly as a part of [480] the Williston Basin in 1949.

Q. And during the course of that study, did you become acquainted with the Cedar Creek Anticline as shown on these U.S.G.S. maps, Exhibits 1 and 1-A?

A. I did, as to the surface and as to the sub-surface.

Q. Were you engaged in that study or some work for Shell in the Williston Basin when the Amerada well came in in May, 1951?

A. I did, I had prepared a special report for Shell Oil Company covering the Williston Basin.

Q. Will you state whether or not Shell Oil Company drilled a discovery well at Ritchie, which came in in July, 1951?

A. They did.

Q. Now, during 1950, did you have occasion to do some work in the Cedar Creek Anticline?

A. We did, we had very detailed studies made of the rock samples that were obtained from the N.P. No. 1, Carter well, Warren well, and Smith well, and we were conducting seismic operations along the Cedar Creek Anticline.

Q. When you refer to seismic operations, what do you have in mind?

A. In our seismic operations, we have a crew of men and equipment, the principle of which is to set off a charge of dynamite, and the sound therefrom is reflected down into the ground and it is re-

(Testimony of T. R. Barnes.)

flected back by various layers in the earth's [481] surface, and being reflected back, recordings are made of those.

Q. Yesterday, Mr. DeWolf referred to geophysical work. How does it relate, the two terms, geophysical and seismic?

A. Geophysical includes seismic work, geophysical being any of those studies pertaining to the earth, seismic being those that refer to sound in the earth's surface.

Q. Now, over what portion of the Cedar Creek Anticline did your seismic traverse during 1950?

A. It started at the north end, as shown on the maps, and extended through to the south end of the structure that is the Baker-Glendive or Cedar Creek Anticline.

Q. What have you to say as to whether or not that was an over all reconnaissance, a quick reconnaissance, or a detailed section by section seismic operation?

A. No, we started in at the north end on a reconnaissance program, that is, making sections as Mr. DeWolf has told they did down in the south end across the anticlinal structure at three to five miles apart, and the early part of 1950, one of these cross sections was approximately where the Pint Unit is. It indicated some possible closure, that is, an area in which oil might be accumulating. We then moved south and ran a seismic line across the anticline in what is known as Little Beaver area between the Carter and the N.P. well, the Husky and

(Testimony of T. R. Barnes.)

Smith well being very close thereto, and then [482] came back up along the anticline with various other lines across the structure, one of which was tied into the Warren well.

Q. Now, through Fidelity and M.D.U. and other sources, did you then have available some samples and cores and cuttings and log and electric surveys and so forth that had been taken from and made in the Smith, N.P. Carter, and those other wells that have been described here in the course of this testimony? A. We did.

Q. Now, in what way did you make use of that data from those wells in connection with your seismograph survey?

A. In the seismograph surveys, we got reflections from somewhere within the earth's surface. We may get a series of them that occur at a different time, that is, a different time interval in which they were received back. These may leave you somewhat in the dark as to their occurrence, that is, their depth, so that with the examination of the samples and logs of the wells which were previously drilled, having a very detailed knowledge of those points at which oil shows had been obtained, where the sands or limestones were porous, and having shot a line adjacent to them, we were able to reconcile our seismic picture along the rest of the anticline, so that we could predict within reasonable limits the locations of these possible reservoirs, beds and other localities along the axis of the anticline.

(Testimony of T. R. Barnes.)

Q. Did you also run a survey or a line in Unit 5? [483]

A. We did; there have been a number of them in that unit.

Q. And were you able to tie those findings in with what was available to you from the well known as the Warren well?

A. That's right, we not only could tie it in with the Warren well, but with the wells that were drilled, such as Carter and the N.P. No. 1 well.

Q. Did you also have available from the Warren well the same type of data as I previously referred to? A. Same type, yes, sir.

Q. With the two points of tie in between Unit 5, the Warren well, and the wells in Little Beaver, what were you able to get in the way of interpretations or conclusions?

Mr. Erickson: To which we are going to object on the grounds that the seismic maps are not here, and other information about which he seems to be testifying. They are obviously available, and for the purpose of cross examination, we should have an opportunity to challenge the validity of the showings made on the seismic maps, and without them being here, we can't do that.

Mr. Lamey: If we put the seismic maps in without testimony, none of us would understand them, I wouldn't understand them. I will say, counsel, I don't know whether they are available or not, but if they are, we will certainly get them for you.

(Testimony of T. R. Barnes.)

I am merely asking as to his findings, conclusions and opinions as a professional man. [484]

Court: Yes, I don't understand that it is a requirement that before his testimony is admissible that the maps or any written memorandum that he made at the time be introduced in evidence. If he testifies from them, then, of course, you are entitled to examine him.

Mr. Erickson: He is testifying from them because he says he has specific knowledge of geological characteristics of Unit 5, based upon a study of the seismic data contained in a report, certain maps or charts prepared for him. He is now testifying from those. We have no way to impeach the validity of his testimony without the seismic maps, we have no way to challenge the validity of his testimony, and we would object to his testimony until they are produced.

Court: Court will stand in recess until 3:15.

(10-minute recess.)

Court: Counsel, it would seem you are asking the witness to give his conclusions based upon reports that are not in evidence and are not available.

Mr. Lamey: I would like to have the question read, your Honor. May I have it?

Court: Yes.

(Question read back by Reporter.)

Court: Obviously, while the question itself doesn't call for it, obviously, from the testimony of the witness, he is testifying to his opinions and conclu-

(Testimony of T. R. Barnes.)

sions drawn from other [485] reports. They are not in evidence, and they should be available.

Mr. Lamey: Well, he would be drawing from logs of wells, cores, cuttings, seismograph or electric logs.

Court: Counsel is entitled to cross examine him upon those as to the validity of his conclusion from those logs and that sort of thing. You can't bring a witness in and say, "This is his conclusion," and we are stuck with it. Counsel is entitled to examine him upon that.

Mr. Lamey: I think a professional witness can give his opinion.

Court: You can give his opinion, but you have to make available to counsel the facts upon which he is basing his opinion; otherwise, how does he cross examine him. It may be that other expert witnesses would come to a different conclusion from the very same data. He is entitled to go into that.

Mr. Lamey: I don't follow that, your Honor. It would be a physical impossibility. I don't know how many loads it would take, it would fill the courtroom here, cores and cuttings out of wells. They would come from various places in the state.

Court: I think you could make arrangements for the proper examination of them. Because it is difficult doesn't make it admissible without them.

Mr. Lamey: We would have three inch cores, we would have [486] hundreds and hundreds of feet——

(Testimony of T. R. Barnes.)

Court: Counsel is entitled to have his expert examine them just as this expert.

Mr. Lamey: Does he have an expert?

Court: I don't know. We are not entitled to ask him at this point. If he makes objection, I think that is all that is necessary. How else is he going to cross examine this man with reference to his conclusions?

Mr. Lamey: If I had it, I would have someone and I would ask him about it. I wouldn't want to look at cores.

Court: It wouldn't do me any good, either, but he might have an expert.

Mr. Lamey: I would put the expert on the stand and have him give his opinions.

Court: I don't think he could do it unless he looked at these things.

Mr. Lamey: I would have him go down and make searches, whatever he could find to base his opinion on. He could read books, reports or anything else.

Court: Isn't it the same thing if a doctor comes in and interprets an X-ray, some other doctor can't get on and interpret the X-ray without examining it, he can't interpret the same X-ray without looking at it. You have to make that same X-ray available. If the opinions this witness is giving are based upon logs and reports and seismograph, whatever they are [487] called, then they have to be made available.

Mr. Lamey: That is what I have said. Take

(Testimony of T. R. Barnes.)

seismograph work, take it in here and it goes into evidence, then everyone else, Mr. Wight, everyone else interested in oil comes in and photostats it, and it makes it available to themselves for their information.

Court: That is what happens, and that is why some people settle cases, because they don't want to disclose certain facts. You are always faced with that proposition, not in just this case, but in every case, that you have to make disclosures you don't want to make, if you are in a lawsuit.

Mr. Lamey: I don't want to belabor the Court. I will go ahead and get whatever information other than that that I can, develop the facts and then endeavor to make an offer of proof.

Q. Now, Mr. Barnes, after completing your geophysical work, did you locate a well on the Pint unit? A. We did.

Q. About when was that well commenced, do you know? A. It was spudded in July 8, 1951.

Mr. Erickson: May I at this point, your Honor, having first learned definitely of the existence of the seismic data, and having learned from the witness Cox that the best evidence of value is to be found from a study of geological and seismic data, make a demand upon the defendants through this witness [488] to produce those various items on the matter of value?

Court: Well, I don't know whether your demand is of any effect as of this point. Counsel doesn't

(Testimony of T. R. Barnes.)

have to prepare or submit information to you as a result of their investigation and operations.

Mr. Erickson: I believe the rules—I am not going to press this point—but it does occur to me that under the rules when it is developed from their evidence that the best evidence of value is the seismic information, and it is in their files, and since it just came to our knowledge now, that we would be entitled to that information, and the opposing side would not be permitted to put in any other evidence other than the best evidence, which is available in their files. I may be entirely wrong on it, but it seems to me——

Mr. Lamey: He can't object to me putting it in and on the other hand demand I produce it.

Court: He is not objecting to you putting it in, he is objecting to you not putting it in.

Mr. Erickson: I am going to withdraw my demand. I haven't had a chance to study it out. We want to get this lawsuit finished, and I think so far as the matter of value is concerned, I wouldn't want to require the Court to make a ruling, or delay ruling for the purpose of arguing the validity of that proposition.

Court: Very well. [489]

Q. All right, to continue with the Pine well, when did you first get a show of oil in that well?

A. That was about October of 1951.

Q. And at what depth?

A. Somewhere between eight thousand, or about between 88 hundred and nine thousand feet.

(Testimony of T. R. Barnes.)

Q. Now, were you able to correlate the findings of the formations found in that well with the wells down in Little Beaver that had been previously drilled? A. We were.

Q. And were you also able to relate that to your surveys and geophysical survey?

A. With the information obtained from the rocks penetrated, we were able to tie that into the seismic surveys and into the same units that had been penetrated in these other wells to the south.

Q. Now, then, where did you locate the next well?

A. The next well was located in what we called the Little Beaver area, west of the N.P. and Carter wells which had been previously drilled.

Q. Why did you locate the well there?

A. Based upon our interpretation of the well data and our seismic information.

Q. By well data, you mean what?

A. The well logs and core samples and various tests that [490] had been made in these wells.

Mr. Erickson: At this time we move to strike the response to the last question because here again it is obvious there are logs available and various other information, and while the matter on which the witness is testifying is not particularly material, it is obvious we are being confronted again with the same situation.

Court: Yes, counsel, it seems to me you are asking him why did he locate a well there, and he said because he had available to me certain logs,

(Testimony of T. R. Barnes.)

cores, other reports and studies, whatever they are, and he studied those and made his conclusion. You are the one putting it in. If you want to put it in, you have got to make that available. What is the purpose of this testimony this witness is giving? What is the particular purpose?

Mr. Lamey: If permitted to go ahead, to show the relationship of one end of the field to the other and the over all structure in this anticline.

Court: I am anticipating he is going to say, "This is one structure." He is going to say, "I base that on this information that I got." Now, is it going to be a secret to him, is he the only one that is going to be able to testify here with reference to his conclusion from that information? Isn't the Court entitled to find out what that information is? You want me to believe him. You have got to make that evidence [491] upon which he bases his conclusion available so that other experts can come in and say, "No, Court, No, Judge, his conclusion is wrong, this is not one structure. These cores, these reports, this data all show this is three different structures, or two," or however many it is, you see. His conclusion is of no value to me unless it can be put to the test of cross examination.

Mr. Lamey: I have tried to explain it is impossible to bring it into court. It would be a physical impossibility in the first place.

Court: It may be. We don't have to bring it into Court. It could be brought some place where counsel with an expert can have an opportunity to

(Testimony of T. R. Barnes.)

examine it. All you have to do is say that is what you will do, and counsel will have an opportunity to look at the reports. He may not question the matter after he has examined it. It is the same thing as I mentioned before, an X-ray. A doctor gets on the stand and tells me an X-ray shows there was a broken bone. There is no way in the world that you can cross examine that doctor unless the X-ray is available.

Mr. Lamey: I think in your situation if the doctor came in, could he not say, "I have examined this. I think there was a broken bone."

Court: Yes.

Mr. Lamey: All right. He is cross examined, and they [492] want to get the X-ray subpoenaed quick——

Court: The doctor can come in and say there was a broken bone. If he comes in and says, "There is a broken bone because I looked at an X-ray of it." You would bring the X-ray in and look at it. He can't say there was a broken bone because an X-ray discloses it without giving us an opportunity to see the X-ray.

Mr. Johnson: May I say one thing? It is my understanding this evidence is not offered for the purpose of showing that a particular spot in this anticline is productive or not productive of oil. We are merely trying to show how a geologist, such as this man, utilizes information which is available to him from wells. We are not trying to say what the particular results are, but only describe the method.

(Testimony of T. R. Barnes.)

Court: We are not interested in the method particularly except as it supports his conclusion that this is one structure. Then when you describe that method, you are asking him a particular fact, a conclusion of his as a result of his investigations, his on the spot examination and other data and information. Now, you have already had some witnesses testify this is one structure, but they were not claiming they were basing their opinion on the same thing that this witness claims he is basing his opinion on. If this witness said, "I went out and walked over and examined the property and in my opinion, it is one structure," it would be fine, it is all [493] there is to it, but the minute he says he bases it on information from these logs, then in order to give the Court information, in order to protect the opposing party, those logs should be made available. How else can counsel cross examine this witness as to the validity of his conclusion?

Mr. Lamey: I would be prepared to cross examine any witness that he would put on here with reference to say, a contrary opinion, without logs or anything else.

Court: I don't see how you could.

Mr. Lamey: I would come into Court prepared to do that; I am prepared to do it if he puts one on, and it wouldn't help me at all to see a core.

Court: It wouldn't help you, but it would help your expert who would advise you.

Mr. Lamey: I am talking about him putting his

(Testimony of T. R. Barnes.)

expert on and how I could examine him. As I say, having a core wouldn't help me.

Court: If this witness, Mr. Lamey, draws a conclusion from that core, no one can tell whether his conclusion is valid or not unless they can see that core too and examine it.

Mr. Lamey: Your Honor, what you are doing is actually making a physical impossibility—when ever a man goes out here, a geologist, if he has to make his source available. He goes to the Black Hills and picks up a rock and makes an examination [494] of it and can find the same outcropping in a well 2,000 feet deep. If he testifies to that relationship, he must bring the rock from the Black Hills with a piece of the core down 2,000 feet. We come into Court with that. He goes to the records in Helena of the logs of wells and looks those over. I must get somebody from the Conservation Board with all those. If the N.P. had a core of well in its St. Paul office, I must get all the cores because he looked at them, and on and on, a two or four year study. No geologist could come in under the rule laid down by the Court and actually give his opinion.

Court: Yes, I think he can.

Mr. Lamey: Not if he seen anything or made an investigation. If he walked over the top of this, that kind of an opinion would be no good. He could walk over it, and everyone would laugh at him if he walked through the Cedar Creek Anticline and said it is one structure. In these days, he

(Testimony of T. R. Barnes.)

must have these modern methods. That is the effect of this ruling, and really, I don't think it can be done. Another thing, Mr. DeWolf testified here. He gave his opinion. He had a seismograph, of course. It was finally put in on their insistence. It just shows where the lines were shot.

Court: The objection wasn't made at that point, I don't believe.

Mr. Lamey: We are in the situation now where no geologist [495] in the State of Montana can give an opinion.

Mr. Erickson: In DeWolf's testimony, the major portion of it was available from the map; he testified primarily from the map, and we were in the position where we could decide whether we wanted to object or didn't want to object. He didn't deal so specifically with particular wells. Of course, the Court has, by the statements made by the Court, they include all of our position on it, and we believe that analogy between this situation and the X-ray is perfect and complete, and if opposing counsel wants to use a witness like this, they just run up against the problem where they have to make the choice whether they want to do it or not. I am agreeable to going any place and looking at those things. Of course, I don't believe it does me any good to look at a core, but it does Mr. Barnes. We would have our experts, too, available, who would go and look at it, and then we would have some basis for drawing a conclusion. I don't believe the picture Mr. Lamey paints is exactly cor-

(Testimony of T. R. Barnes.)

rect. I believe a geologist can give an expert opinion under proper circumstances, but can't do it, in my opinion, by bringing in a specific well and saying, "I looked at the log of the well and I saw that seismic picture," and then go ahead and give his opinion without those being available.

Court: That is my opinion, and I am going to sustain the objection to it. You are in the same position as Judge Erickson [496] is on another point in the case. You can brief it later. If I am wrong, I will reopen it for you. For your purpose, I don't see how I can permit the testimony at this time.

Mr. Lamey: I take it under the rules, rather than make an offer of proof, the procedure would be to go ahead with the questioning, subject to the objection, so as to complete the record.

Court: I am not going to do that because I don't think it is admissible. We are going to open up a whole different picture, and the only thing I can suggest to you is brief the question in your brief and if I find I am in error, I will reopen the matter for you to put that kind of evidence in.

Mr. Lamey: Your Honor, as a matter of procedure——

Court: At this point, you will have to drop it.

Mr. Lamey: My question is whether an offer of proof should be made, or just go ahead, as I take it, under the Federal rules, and have the record made in question and answer form. I can do it on an offer of proof if the Court prefers. I have the

(Testimony of T. R. Barnes.)

rules available here, and that is why I was asking.

Court: Do you have an offer of proof prepared?

Mr. Lamey: Pardon.

Court: You say you have an offer of proof prepared?

Mr. Lamey: No, I have no offer of proof prepared, but as I say, under the rules, you can go ahead with the Court's permission, and ask the questions, subject to the objection, [497] with this understanding: I will go ahead, and when I get through asking questions such as I don't think conflict with the Court's ruling, and when I get through, I will make an offer of proof.

Court: You can go ahead that way.

Mr. Erickson: I am not sure I understand.

Mr. Lamey: What I have in mind is Rule 43, subdivision (c), Record of Excluded Evidence. The first part of it deals with jury trials. The last part says, "In actions tried without a jury, the same procedure may be followed, except that the Court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged." I realize, of course, that the Court has taken the view it is not admissible. Then, I assume, I will have to make an offer of proof.

Court: You don't so far as I can see. The question has been raised, I have ruled on it, and that is in the record. Now, the only thing you have to do so far as I am concerned is argue the matter in a brief, and I will reverse myself if I find I am

(Testimony of T. R. Barnes.)

in error. For an appeal, don't you think the question is already in the record? What I have done is excluded testimony of this witness' conclusion based upon information that is not made available.

Mr. Lamey: I want to put into the record what he would [498] testify to.

Court: Very well, then, make a statement of it.

Mr. Lamey: I will go ahead and get things outside of it if I can and then come back to it. Let me see, I believe--was it Little Beaver, the last question?

(Question read back by Reporter.)

Q. Where was the next development by Shell, or the next drilling let us say, on the Cedar Creek Anticline following Little Beaver?

A. You mean as an exploration well?

Q. Yes.

A. The next well was in the Cabin Creek area.

Q. Is that identified on the map, Exhibit 1?

A. That is this Cabin Creek Unit, as shown on the map (indicating).

Q. Now, since the discovery in Pine, will you describe in a general way what has been the overall activity of the defendant Shell Oil Company on the Cedar Creek Anticline in the way of drilling and exploration?

A. That is in our development program, and after an exploratory well is drilled, the next step is to step out, shall we say, quite rapidly. For instance, in the Pine Unit, we drilled wells both east and west of the discovery, and then started out

(Testimony of T. R. Barnes.)

along the axis to the south, drilling these out-stepping wells, that is, wells a mile or a mile and a half from adjacent [499] production, in order to define the limits of these productive areas as rapidly as possible. The same was done in the Cabin Creek area, and likewise in Little Beaver. We drilled several wells to the northwest, and recently to the north of the discovery wells, that is, the discovery of commercial production, and we located several other wildcat wells, one of which was drilled as shown in the Coral Creek Unit, which is essentially Unit 7. Other recommendations to drill were likewise made, some of which we were unable to complete due to——

Mr. Erickson: Just a minute, I am going to object because the witness is obviously volunteering, and it is not responsive to the question.

Mr. Lamey: Very well, I will put another question.

Q. You drilled a well on Coral Creek?

A. Yes.

Q. What was the outcome of that well?

A. That well was a dry hole.

Q. And what is the most northerly well that Shell has drilled from the Little Beaver area toward Unit 5?

Mr. Erickson: May I have the question?

(Question read back by Reporter.)

A. That was the Coral Creek, which was drilled in 1954.

Q. And now going to the Pine well, what is the

(Testimony of T. R. Barnes.)

most southerly well from the Pine and in the direction of Unit 5 that Shell has drilled? [500]

A. That would be in the south end of the Cabin Creek Unit.

Q. What has been the extent of activity since the discovery of Pine, as you may describe it by the number of rigs you have kept actively engaged in the Cedar Creek Anticline?

A. Including our exploratory and development efforts, it has never been less than two, and there has been as high as 10.

Q. Has there been any drilling in Unit 5?

A. No, there has not.

Q. Have you approved a location, or have you approved drilling in Unit 5?

Mr. Erickson: To which we object on the grounds it is incompetent, irrelevant and immaterial.

Court: Sustained.

Q. Prior to the commencement of this action, had you recommended drilling in Unit 5?

Mr. Erickson: To which we make the same objection. I can't see the relevancy or materiality of any recommendation made for drilling.

Court: Sustained.

Q. Now, what amount did the Shell Company spend during—strike that out. Do you know the cost of the seismic work and its geophysical work on the Cedar Creek Anticline during the years 1950, 1951 and 1952?

Mr. Erickson: To which we object on the grounds it is [501] immaterial and irrelevant.

(Testimony of T. R. Barnes.)

Court: What is the question, Mr. Parker?

(Question read back by Reporter.)

Court: Overruled.

A. Approximately \$725,000 for the field operations alone.

Q. And do you know the cost of similar work in the years 1953 and 1954?

Mr. Erickson: We will make objection because that is too remote and after the action was filed, again being irrelevant and immaterial.

Court: Overruled.

A. Approximately \$600,000.

Q. When your company went into the Cedar Creek Anticline on its seismic work, was it of value that all of the lands, or a large portion of the lands were blocked up under the Fidelity operating and other agreements?

Mr. Erickson: To which we will object on the grounds it is immaterial, irrelevant and outside the issues of the case, and no foundation.

Court: I will have to ask you to repeat the question.

(Question read back by Reporter.)

Mr. Erickson: My objection would be, your Honor, it is irrelevant and immaterial and isn't illustrative of any issue in this case. There is no pleading that would raise the matter. [502]

Court: What is the purpose?

Mr. Lamey: This Fidelity operating agreement refers to the whole Cedar Creek Anticline. I want to put in in what way it allowed his company to

(Testimony of T. R. Barnes.)

go ahead speedily with examination and development.

Court: Under the agreement?

Mr. Lamey: Yes.

Court: That is for the Court to determine, not for Shell, what could be done or couldn't be done under that agreement. That is going to be a matter for the Court to determine, isn't it?

Mr. Lamey: Yes, under the agreement what could be done. But the fact is from an exploration standpoint, it, of course, put this whole unit together in one block.

Mr. Erickson: We are contending as to Unit 5 and our lands, we are contending they weren't covered by any Fidelity operating agreement, and the Court will have to make the determination as to whether there was one. I don't believe there is any foundation for the answer.

Court: I will reserve ruling on it. Put it in.

A. It was, very much, to us.

Q. In what way?

A. In our exploration program, we must acquire lands prior to very expensive exploration such as our seismic efforts, so that when we find what we call a drillable location, we have [503] control of those lands, and if we have to pick them up 40 acres by 40 acres, a greater time is consumed than if we are able to acquire them as we did in these unit agreements, many thousands of acres. Our program was able to expand very rapidly and cover the area.

(Testimony of T. R. Barnes.)

Mr. Erickson: We are going to make objection and move to strike the answer.

Court: All he is saying is Shell thought they were dealing with the right people, isn't that what he is saying?

Mr. Lamey: I think they have a right to say that when this agreement is on record, a recorded document, unreleased.

Court: Yes, if it was a question of good faith or bad faith. I don't think it is here.

Mr. Lamey: We have estoppel and laches in here, whether they can sit by and allow these on record. The evidence is they never asked for a release. They are on record. Someone goes in and they are all blocked up. Certainly, he has a right to rely on that.

Court: Of course, it was important for them to deal with the right people.

Mr. Lamey: If they made a mistake, that is what the Court is going to determine.

Mr. Erickson: In view of the argument made by counsel, this witness assumed, from his answer, they had acquired the rights. He was, therefore, usurping the power of the Court [504] in this matter, and while this is not the proper place for arguments of the case, we point out that relying on the records themselves——

Court: Insofar as the question or answer may impinge upon the responsibility of the Court, the Court won't consider it, but to illustrate the point counsel offers it for, it is admitted. In other words,

(Testimony of T. R. Barnes.)

when they go into this kind of an operation, they must control the acreage. That is the point.

Mr. Lamey: Now, may it please the Court, at this time, we offer to prove by the witness now on the stand that, if he had been permitted to testify, that he would testify that having available to him information with reference to the wells in Little Beaver and Warren, and having had seismic surveys made through the Cedar Creek Anticline, and particularly with his survey between the N. P. well and the Carter well, and a survey at the Warren well, that he was in a position to better interpret his geophysical survey, and that as a result of that, he was able to conclude the various depths at which reflecting horizons might be found and tie those in definitely between the Warren well in Unit 5, and the wells in the Little Beaver area. I think I will make my offer of proof up, if I may, and if the Court will rule, I will make a further offer for the reason I think there might be a little different situation with reference to the sections of the offer of proof.

Court: What is the purpose of this first offer then, [505] what is the purpose of that testimony? You say he was able to reach a better conclusion?

Mr. Lamey: Yes, and it shows a tie in between the wells theretofore drilled in the Little Beaver area and the Warren area.

Court: In other words, really, what it is is that it is all one structure, is that it?

Mr. Lamey: I will come to that eventually.

(Testimony of T. R. Barnes.)

Court: I just don't understand the purpose of this offer.

Mr. Erickson: If the purpose of this offer is to establish by an examination of this data there is a definite tie in between all of those wells that would tend to indicate a similarity of structure, I would object to the offer of proof.

Court: Is that the purpose? That is as I understand it.

Mr. Lamey: It is so intended, yes, sir.

Court: On the basis of the discussion already had, I will sustain the objection.

Mr. Lamey: I further offer to prove by the witness, if permitted to testify, he would testify that after drilling the well in Pine, the discovery well, that he was then able to tie in the location of formations in the Pine area with those in Unit 5 and in Little Beaver, tie them in and interpret them as a result of the drilling that had been done in those areas, plus his geophysical survey, and that they definitely showed [506] a similar trend and location of formations below the surface.

Mr. Erickson: Same objection.

Court: Yes, and the Court will rule the same and sustain the objection, it appearing that the offer requires a conclusion of the witness based upon data that is not made available to the Court and counsel.

Mr. Lamey: May it please the Court, we further offer to prove by the witness on the stand, that as a result of his work, study and investigation of the

(Testimony of T. R. Barnes.)

Cedar Creek Anticline, that it was his conclusion and opinion that the area from the Pine to the Little Beaver unit was one large geological structural unit.

Court: As I understand it, the conclusion that he would testify to is also based on this other data of other wells?

Mr. Lamey: Based on the data, and his study of the Williston Basin.

Court: Partly upon data not available here, is that right?

Mr. Lamey: Partly, yes, but not entirely.

Court: Very well, the Court will sustain the objection.

Mr. Lamey: And may I state for the record that in the opinion of the counsel for the defendants, it would be a physical impossibility to bring into Court the various maps, logs, cuttings, rock studies and other data that this witness examined throughout Montana and elsewhere in forming his [507] conclusion.

Court: The maps and logs that he examined, particularly with reference to those on the structure here involved, are the important things. Of course, part of his opinion, counsel, no doubt, is based upon some experience he may have had in Texas 20 years ago, and that, of course, is not what we are concerned with here, but obviously when you tie the matter so close as to logs of other wells drilled in the same area to base his conclusion that the wells are all drilled in one structure, those are

(Testimony of T. R. Barnes.)

matters that must be made available, and the Court excludes the evidence at this point.

Mr. Lamey: Your Honor, as I understand, bringing in the logs and geophysical surveys wouldn't cover the objection or the Court's ruling.

Court: Yes, I think probably it would, because he hasn't testified, as far as I recall, he hasn't testified that he himself studied cores or anything else, but if he did, and those cores are available, they should be made available.

Mr. Erickson: So there be no doubt on it, on the matter of impossibility, we would waive any demand that we look at the cores, but also as to the matter of impossibility, while it may be difficult for us as well as opposing counsel, I can assure counsel if those maps are made available in Shell's office here, Casper, Denver, or wherever they may be, we would be able to accommodate ourselves so we could come and look at [508] them there.

Court: As I say, obviously we are not going to fill the courtroom with cores or anything else like that, but the thing is, the maps and the logs should be made available to the Court and counsel for examination in order to test the validity of the conclusions offered. Now, on that point, as I mentioned before, you will, of course, and I would appreciate a brief on the matter, because if I am in error, it will be an easy enough matter to reopen the matter and let you put that evidence in, if I am in error.

Mr. Lamey: You may cross examine.

(Testimony of T. R. Barnes.)

Court: Let's take a short recess now until quarter after four.

(10-minute recess.)

Cross Examination

Q. (By Mr. Erickson): I don't believe the record shows, Mr. Barnes, the location of the Coral Creek well. I have examined the map, Exhibit 1-A, and I find a legend there on Section 22, Township 6 North, 60, which says "Shell Coral Creek, 33-22." Is that the location of it?

A. That is the well I refer to.

Q. Calling your attention to the location of that well, it is adjacent to certain lines here, which I understand to be [509] contour lines, is that correct? A. Correct.

Q. And it is a matter of some 12 miles or so below the Cedar Creek?

A. About nine and a half from the edge of Unit 5.

Q. And, of course, the map speaks for itself. Has Fidelity Gas paid you any part of the cost of these seismic work and surveys on the Cedar Creek Anticline?

A. That I am not qualified to testify to.

Q. And you wouldn't know any more about whether they paid any part of the drilling costs?

A. No, I would not.

Q. Shell has drilled no wells in Unit 6, I think you testified, saying that the Coral well was the closest one from the south, is that correct?

A. That's right.

(Testimony of T. R. Barnes.)

Q. That is with relation to Unit 5. And there is, I believe, according to the map, Exhibit 1, at least one Shell well on the extreme northerly edge of Unit 4, is that correct?

A. That is still within Unit 3, just adjacent to the boundary of Unit 4.

Mr. Erickson: That is all I have.

Mr. Lamey: No further examination.

(Witness excused.) [510]

E. G. CHRISTIANSON

called as a witness on behalf of defendants, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Lamey): Please state your name?

A. E. G. Christianson.

Q. Where do you live?

A. Denver, Colorado.

Q. What is your business or profession?

A. I am employed by Shell Oil Company. I am Chief Exploitation-Engineer for the Denver area.

Q. Are you a geologist by education?

A. I am an engineer, a Bachelor of Science in Mining Engineering.

Q. From what college or university did you receive your degree?

A. University of Wisconsin.

Q. When was that?

A. In June of 1937.

Q. And have you since worked in the field of your profession?

(Testimony of E. G. Christianson.)

A. I joined Shell Oil Company in March, 1938, as exploitation engineer, and have subsequently worked for Shell Oil Company in that capacity through various different posts in Texas, Louisiana, and through various different Shell operations. [511]

Q. Are you familiar with the Cedar Creek Anti-cline area shown on Exhibits 1 and 1-A?

A. Yes, I am, that is under the Denver area supervision.

Q. Will you now explain to us a little more in detail just what your department does in connection with the development and operation in this Cedar Creek area?

A. Well, the actual drilling operations are conducted under the Production Department supervision, and the engineering applications are under the group of engineers under my supervision. The development work following the establishment of production in these various different spots on the anti-cline is supervised by Shell's Production Department.

Q. Are you in charge of that department?

A. No, I am in charge of the Engineering Section.

Q. What is the relationship of that position——

A. As a staff member to the Production Manager.

Q. When a well is started by Shell, where do you pick up?

A. After the, I mean after the establishment of production in an area, the supervision of the land

(Testimony of E. G. Christianson.)

passes to the Production Department, and plans for development of that acreage emanate from the Production Department. Our Engineering staff prepares a program of development.

Q. And do you have available to you the various records with reference to the wells that have been drilled in the Cedar [512] Creek Anticline by Shell?

A. Yes, I do, I have prepared a tabulation from Shell's official company records which shows the chronological order of development to March 31, 1955, of all wells drilled by Shell, either as operator of units, or by Shell for their 100 percent account.

Q. Now, were those the same wells that are shown on the map Exhibits 1 and 1-A?

A. Essentially that, except in the tabulation there also will appear groups of wells that operations have been conducted on beyond the time at which this map was concluded, to bring up the development subsequent to the preparation of the map, to the March 31st completion of this report.

Q. Does this tabulation bring your drilling and development activities up to date on the Cedar Creek Anticline?

A. Yes, to March 31, 1955.

Q. As I understand, you have shown certain wells, starting with 44, which do not appear on the map in evidence, Exhibits 1 and 1-A, is that correct?

A. Correct.

Q. In your tabulation, have you given the exact location of each well?

A. Yes, we have.

Q. Also the date of commencement and date of

(Testimony of E. G. Christianson.)

completion? A. Yes, sir. [513]

Q. Total depth? A. Yes, sir.

Q. And the total cost?

A. Yes, sir. In those cases of the wells that have not been completed, we have included in the tabulation our estimated cost of the entire job of drilling and completing that well.

Q. Does that tabulation also give information with reference to initial potential oil flow?

A. Yes, sir.

Q. And what else with reference to the well?

A. It also shows the percent water cut of the initial completion; it shows the formation from which the well is completed, the intervals below the surface in which the well is producing, and contains additional remarks as to the method of completion.

Q. In a few instances, I notice a legend "D and A". What does that mean?

A. In the abbreviations also appended at the bottom, that is explained. The "D and A" is an abbreviation meaning drilled and abandoned.

Q. By abandoning a well, you mean what?

A. We mean the well was incapable of production commercially and was abandoned.

Mr. Erickson: If this is going to be offered as an exhibit, I have an objection merely as to its materiality and [514] relevancy to the issues of the case, but as to the form and accuracy of the figures reflected, I have no objection.

Court: Very well, mark it, and the objection is overruled. What is the number?

(Testimony of E. G. Christianson.)

Clerk: Exhibit 60.

(Defendants' Exhibit 60 admitted in evidence.)

Q. I think, Mr. Christianson, you showed that the total number of wells drilled, 53, is that correct?

A. Yes, as of March 31st.

Q. That had been drilled or drilling?

A. Drilled or drilling. Looking back up the line there, 44 wells had been completed, nine were in the process of either completing or drilling.

Q. Now, from the time of the discovery by Shell in the Pine well in 1952, what have you to say as to the transportation situation of the crude oil?

Mr. Erickson: I am going to object because I don't believe it is material or relevant.

Court: As of what time?

Mr. Lamey: The discovery of the Shell well, immediately after that.

Court: And what is the purpose, counsel?

Mr. Lamey: I want to develop the economic situation and the necessity of developing the whole area in the development program. [515]

Mr. Erickson: If it please your Honor, I can't see how that would be relevant or material in this case that they thought it would be desirable to have a large area of land, as to whether Fidelity Gas complied with the terms of the contract or the contract terminated, or on the matter of estoppel.

Mr. Lamey: Maybe I can develop it another way.

Q. What does it cost to ship a barrel of oil out

(Testimony of E. G. Christianson.)

of the Cedar Creek Anticline to either a pipe line or some place where it is finally purchased?

Mr. Erickson: I am going to make the same objection. I may say, counsel, I have no desire to delay the matter, because we are all hoping to be through, but I just don't see the relevancy or materiality of it.

Mr. Lamey: All right, we will withdraw it. You may cross examine.

Cross Examination

Q. (By Mr. Erickson): The Exhibit 60 shows the depths of the wells, does it, Mr. Christianson?

A. Yes, sir, it shows the total depth to which they were drilled.

Q. By referring to Item 22, Coral Creek Unit, and I believe that is the only well drilled in the Coral Creek Unit, it shows a depth of 9190 feet, is that correct? [516] A. Yes, sir.

Q. And it shows "Drilled and Abandoned", but it doesn't seem to have anything to indicate what formation was reached. Can you tell us why that wouldn't be there?

A. Actually these formations have reference to the producing wells, to the producing interval.

Q. So you can't say from looking at this exhibit whether the Ordovician was reached in the Coral Creek well, is that correct?

A. You cannot say it in this exhibit, but I can tell you.

Q. Tell us, please?

(Testimony of E. G. Christianson.)

A. The well was drilled to the Red River Ordovician.

Q. The map indicates, that exhibit, the exhibit indicates that except as to some wells, particularly in the north, the producing zone generally is the Ordovician, is that correct?

A. Yes, generally.

Q. This Exhibit 60 doesn't show any income you may have received from the sale of oil, does it?

A. No, sir.

Q. It reflects only expenditures?

A. Yes, sir.

Q. Can you say from having prepared the exhibit whether or not Fidelity Gas has reimbursed Shell for any of the expenses here?

A. No, sir, I cannot tell you from that. [517]

Q. Do you know?

A. No, sir, I don't know.

Mr. Erickson: That is all.

Redirect Examination

Q. (By Mr. Lamey): Mr. Christianson, on your showing of total costs——

A. Yes, sir.

Q. ——do you have reference there to anything more than the cost of drilling the well and connecting it up to the pumps?

A. Yes, sir.

Q. Tell us what that includes?

A. There are also included expenses shown as operating there, maintenance expenses, which include surface equipment repairs and well repairs, which are occasioned as the wells are unable to con-

(Testimony of E. G. Christianson.)

tinue to produce; there are also shown costs of field improvements, broken up into equipment, gathering lines, and roads. In our operations, it is, of course, essential that roads be established to the drilling sites, and beyond that, we have constructed roads from Glendive out toward the operations in a southerly direction. Similarly, the gathering lines represent a pipe line that has been constructed to connect our production in Cabin Creek to the production in Pine, and an extension then to a railroad siding at Colgate.

Mr. Lamey: That is all.

(Witness excused.) [518]

Mr. Lamey: That is all, your Honor, the defendants will rest.

Court: Very well.

Mr. Erickson: Call John Wight. We have just a couple questions on rebuttal.

JOHN WIGHT

recalled as a witness on behalf of plaintiffs, having previously been sworn, testified as follows:

Direct Examination

Q. (By Mr. Erickson): Mr. Wight, on your direct examination, you testified that you went in to see Cecil Smith and Mr. Heskett at their offices in Minneapolis sometime in April of 1938, is that correct? A. That's right.

Q. And you produced a check, which is an exhibit, being dated April 8, 1938, payable to the Hotel Nicollet, the Exhibit being No. 23. Since the

(Testimony of John Wight.)

time when Mr. Cecil Smith testified here that you had not been in his office during the early part of 1938, have you checked your files to see whether there might be other material in those files that would tend to refresh your recollection further as to your visit in the office? A. I have. [519]

Q. What did you find?

A. I found a letter from——

Q. On the letterhead of Montana-Dakota Utilities Company?

A. From Montana-Dakota Utilities Company.

Q. And the letter apparently bears the signature of Alger Syme, is that right?

A. That's right.

Q. Proposed Exhibit 61 is a letter on the letterhead of Montana-Dakota Utilities dated April 15, 1938, addressed to you. Taking a look at that letter, what is there in that letter that serves to further refresh your recollection as to your meeting with these gentlemen in April, 1938?

A. This letter is in answer to a previous letter I had written to Mr. Syme where he said he was expecting me to the office as soon as I returned to Chicago, and after I had returned from Chicago in the first part of April or last part of March, I would stop in the office. I recall that very definitely.

Mr. Erickson: Offer Exhibit 61.

Mr. Lamey: No objection.

Court: Admitted.

(Plaintiffs' Exhibit 61 admitted in evidence.)

Q. Mr. Wight, you heard the testimony of Mr.

(Testimony of John Wight.)

Cecil Smith that he had no conversations with you during 1937 and 1938 or at any time concerning the abandoning of the Warren well, or [520] concerning any statements supposed to have been made by him as to the intention of Fidelity Gas and Montana-Dakota Utilities to cease and abandon operations. Having heard that testimony, is your testimony the same as it was on the direct examination as to those conversations?

A. Absolutely, positively the same.

Mr. Erickson: That is all.

Cross Examination

Q. (By Mr. Lamey): Mr. Wight, you have referred to Exhibit 61, being a letter from Alger R. Syme, Attorney, on the letterhead of Montana-Dakota Utilities Company, dated February 15, 1938, directed to you in Whittier, California. What way did you say this refreshes your memory that you were in Minneapolis on some day?

A. Because I remember after reading that letter, it helped refresh my memory that I was in Minneapolis, and I told Mr. Syme I would be in Minneapolis as soon as I returned from Chicago, and I remember after reading that letter, that refreshed my memory, made me positive I was there as I testified, in the last of March or first of April.

Q. As I read the letter, "On January 25 you wrote me stating that you expected to be in Chicago for a few days, and upon your return would see me in Minneapolis in connection with the [521] certi-

(Testimony of John Wight.)

fied copy of minutes of Directors' Meeting of Midwest Holding Company authorizing the Bowdoin Unit agreements. As I have not heard of your calling at the office, I am wondering whether you made the trip or still expect to make it." You say that reminds you you were in Minneapolis on what date?

A. The last part of March or first part of April.

Q. Then, you connect that up with the check given to the Nicollet Hotel on April 8, 1938, is that the way you refresh your memory?

A. That's right.

Mr. Lamey: No further cross examination.

(Witness excused.)

THOMAS A. JIRIK

recalled as a witness on behalf of plaintiffs, having previously been sworn, testified as follows:

Direct Examination

Q. (By Mr. Erickson): Mr. Jirik, you heard Cecil Smith's testimony in which he denied that the conversations you related with him in his office in 1937 and 1938 ever occurred, and he also testified that in the visit made to his office by you in the company of Mr. Seivers, there was no such conversation as that which you testified to on direct. Having heard his testimony, would your testimony now be the same as it was on direct in spite of his [522] statements? A. Yes, sir.

Q. As to the conversations he testified to concerning the Husky, do you recall ever having any

(Testimony of Thomas A. Jirik.)

discussions with Mr. Smith concerning drilling of the Husky well? A. Not Husky.

Q. Was there any conversation concerning Husky?

A. No, not to my memory; Carter.

Q. You did discuss Carter with him, is that correct? A. Yes.

Q. At the time you had the discussions concerning Carter, was there any discussion concerning any interest Fidelity might have in the Carter well?

A. Not to my knowledge.

Mr. Erickson: That is all.

Mr. Lamey: No further cross examination.

(Witness excused.)

Mr. Erickson: That is all for the plaintiffs.

Court: Well, I think each side has one point, or at least one point on evidence to discuss seriously with the Court, and it may be you would want to argue those points, submit briefs on those points before you file your briefs in the case itself. What do you think? That is with reference, for example, to this question on whether or not an expert can testify without disclosing the basis upon which he testifies. In other words, [523] that is as I understand the situation, that you wanted your witness to testify as to a conclusion based upon certain reports that he read and that were available to him without disclosing what was in those reports.

Mr. Lamey: Upon that I am perfectly willing to disclose. I think the record here said to bring the reports and everything into Court, but the point

the Court is inquiring about, I think, is did we want to brief just those questions. I think Mr. Erickson——

Court: Maybe we can settle this other question. Of course, reference was made to bringing them into Court. In the first instance that may not be necessary. You may have your witness testify in the first instance without actually having them here so long as it is understood he will disclose what he is basing it on. In other words, a witness says, "I am offering my opinion upon a report." Now, it seemed to me obvious you did not want to disclose what was in the report he was basing his opinion on.

Mr. Lamey: Not a report, your Honor. Mr. De Wolf made one report. He had a lot of background before he ever said to his company, "Drill a well in the Pine Unit." I never even inquired whether that was written or not. But to get to the point, your Honor, which I think the Court began making inquiry about, whether we would like to brief just that subject on our part, and Mr. Erickson brief his, and the Court would probably [524] have in mind if the Court changes his mind on any feature of it, we could go ahead and get that straightened up, and we are perfectly willing to do that any way.

Mr. Erickson: It makes no difference to us either way. The only thing I would like to make very clear, if it isn't already in the record, I wouldn't like this matter to go off on the suggestion made by counsel that the Court's ruling was they couldn't put in the evidence unless they agreed to

bring the material in Court. We are not asking that. What we think the Court was saying is unless you are willing to make it available to the plaintiffs some place, he won't allow the witness to testify. I wouldn't want the ruling to go off on the basis that it had to be presented into Court.

Mr. Lamey: How do we make it available without bringing it into Court?

Court: He can go with you as far as that is concerned.

Mr. Lamey: Could we keep the case open until he went around and followed Barnes trail?

Court: Yes, indeed. It is just the same as examining the site of land. You are not going to bring that in here, but you can go out and look at it. It doesn't have to be brought into the courtroom in order to make it available, but over and above that, my understanding was that you didn't want to disclose the contents of the report. Now, is that so?

Mr. Lamey: There is no report. [525]

Court: I mean geophysical data or whatever you call it, old logs of wells. My understanding was you didn't want to disclose that.

Mr. Lamey: As to that, we wouldn't want to disclose, and I don't know, I would have to see it and examine it, but I think there might be some question of whether we would want to come into Court and make available to Mr. Wight and his mimeograph and everything a million and some dollars worth of work.

Court: I can appreciate that; I can appreciate the problem you have. That is the main basis of my

ruling here. It seemed to me obvious you did not want to make that disclosure, so there would be no basis upon which counsel could cross examine. The witness comes in and says, "Yes, I examined a number of reports, I examined the land, and so forth and so on, and my conclusion is so and so." The cross examination commences, "What reports did you examine?" "Well, I examined logs of well number 1." "What did that log disclose?" He is entitled to ask that question.

Mr. Lamey: Right.

Court: Do I understand you are perfectly willing to have your witness answer those questions as to what the logs disclosed?

Mr. Lamey: Yes. The logs of those wells down in the south end are just as available to Mr. Erickson as to us. [526]

Court: And the other data, too. I am not referring just to the logs, but any other data that he examined and upon which his opinion is based, you are willing for him to disclose, and you are willing then for the plaintiffs to have an opportunity to examine them?

Mr. Gullickson: May it please the Court, I would like to clear up one point. On the actual seismic data, as I understand it, they take what are called seismograms, about the size of a shoe. Those are stacked up in an area such as this in huge piles. It takes technical people many months, as I understand, to attempt to evaluate what these actual data shows. Now, actually, when we get to what we are talking about in the nature of a seismic map, a

seismic map represents nothing more or less than the particular geologist's interpretation who is working on that particular project. In other words, the basic data which we would have to bring in Court on seismograph operations would be the seismograms themselves, and let the plaintiffs' experts work for months attempting to evaluate the result of that seismic shooting. That is the practical result of the ruling.

Court: This witness didn't go through all these?

Mr. Gullickson: No.

Court: All he did was look at the over all map.

Mr. Lamey: We haven't examined the witness in detail.

Court: You don't have to make anything available as a [527] result of the witness' testimony over and above what he himself examined and based his opinion on.

Mr. Lamey: He went and made examinations or had people work that down for him to certain points. He may not have examined everyone of those himself. He was on the study from 1949 on.

Court: He didn't examine them.

Mr. Lamey: Not all of them.

Court: If he examined just a map and draws his conclusion from the map, all you have to do is bring in the map. If he examined some logs, make them available. If he didn't examine them, why then, of course, they are of no consequence in the matter. I thought maybe I misunderstood, but I don't think I did. I think you don't want to disclose some of the information upon which he bases his conclusion,

and when that became obvious, then is when I sustained the objection. Let's argue these points, then, on briefs anyway prior to going into the case as a whole because I think there is no use arguing the case as a whole at this point if then later we have to reopen it to correct some ruling I have made, so each of you, I sustained objection as to evidence you were trying to introduce. If you will write a brief sustaining your position on that within 30 days, and counsel may have 15 days thereafter to file a brief in reply to it. Then, as quickly as possible, I will advise you of my rulings, and if I don't change my [528] opinion, then we will fix the date for the filing of briefs in the case as a whole.

Mr. Erickson: There is one practical matter with us. I think on the point of the admissibility of evidence which we offered as to the discussions concerning the meaning of the contract, I think Mr. Richards has sufficient notes to make our brief without reference to the transcript, but it occurs to me we might run into a situation where we would have to ask the Reporter to get us a transcript, at least of that portion of the testimony, and in the event we should encounter some delay there, we would have to request an extension.

Court: Do you think we had better argue it at one time, the whole case?

Mr. Lamey: We would leave it to the Court. If you want us to do it together——

Court: I will advise you specifically of my rulings on these two major points that have arisen during the course of the trial.

Mr. Lamey: Then, would you like us to proceed on the same time you have indicated here?

Court: I would suppose that you want a transcript before you file your briefs.

Mr. Erickson: Yes, and in view of the size of the transcript, and the number of matters to be digested and briefed, I don't believe that 30 days would be adequate for the plaintiffs [529] after receipt of the transcript for the brief. We are anxious to move the matter along, but 45 days would give us more reasonable time.

Court: After receipt of the transcript then, you may have 45 days within which to present briefs on the case as a whole, and on the particular questions of evidence, you may include that in your briefs. What time do you want, 30 days after receipt of the brief of plaintiffs?

Mr. Lamey: 30 days.

Court: 30 days. If you need more time, it will be available.

Mr. Erickson: In view of the fact the answer sets up affirmative defenses, there are various elements of it and various theories. I wonder if we could have 15 days for a reply brief.

Court: Very well.

Mr. Lamey: May it please the Court, at the time we file our briefs, should we submit findings?

Court: Yes, submit proposed findings and conclusions at the time you submit your briefs.

Mr. Lamey: I ask that in view of Rule 62 of the District.

Court: The Rules of this District are so disin-

egrated it doesn't make much difference what the rule is, but I think it would be a good idea to file at the time you file your briefs proposed Findings of Fact and Conclusions of Law. [530]

Mr. Erickson: There is one other practical matter. We have available a machine here to duplicate the exhibits. I understand the Clerk will be here for the next several days. I don't know whether an order of Court is necessary to permit us to bring the machine over to his office to make duplicates.

Court: Yes, you may do that.

Mr. Erickson: May I, without appearing to be presumptuous, express the appreciation of the plaintiffs to the Court for the courtesy with which you have listened to us.

Mr. Lamey: We too thank you for your patience.

Court: I appreciate the assistance of counsel and enjoyed being with you all. I think we will work the thing out, and the two rulings I have made in the course of the trial, I suppose the more important is the ruling I made excluding the evidence you offered. I don't know the ruling I made with reference to your problem is going to be of importance at all in any event, but you can argue it anyway, but I think you are the one that is up against the blaze, so thank you again, gentlemen. [531]

[Endorsed]: Filed May 23, 1955.

[Endorsed]: No. 15293. United States Court of Appeals for the Ninth Circuit. Cedar Creek Oil and Gas Company, a corporation, International Trust Company, a corporation, H. C. Smith, Susan M. Wight and W. B. Haney, Appellants, vs. Fidelity Gas Company, a corporation, Montana-Dakota Utilities Company, a corporation and Shell Oil Company, a corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Montana, Billings, Montana.

Filed: September 13, 1956.

Docketed: September 24, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15293

CEDAR CREEK OIL AND GAS COMPANY,
a corporation; INTERNATIONAL TRUST
COMPANY, a corporation; MONDAKOTA
GAS COMPANY, a corporation; H. C.
SMITH; SUSAN M. WIGHT; and W. B.
HANEY, Appellants,

vs.

FIDELITY GAS COMPANY, a corporation;
MONTANA-DAKOTA UTILITIES COM-
PANY, a corporation; and SHELL OIL
COMPANY, a corporation, Appellees.

STATEMENT OF POINTS

The points upon which appellants intend to rely on this appeal are as follows:

(1) The Court erred in entering judgment for the defendants.

(2) The Court erred in holding the instruments designated as the Fidelity Operating Agreements, Gas Purchase Agreements and Cooperative or Unit Plan of Development, Unit 5, Cedar Creek Anticline valid, subsisting agreements, in full force and effect as between plaintiffs and defendants.

(3) The Court erred in holding that plaintiffs and each of them hold and own their respective interests in the lands and leases involved subject to

and subordinate to the instruments referred to in point number 2.

(4) The Court erred in making its Finding Number XXI that the defendant Shell Oil Company in accomplishing geological and geophysical surveys and in drilling a well completed in January, 1952, relied on the validity of the Fidelity Operating Agreements.

(5) The Court erred in making its Finding Number XXII that the defendants at no time evidenced any intention or took any action to abandon their rights on the Cedar Creek Anticline under the Fidelity Operating Agreements with respect to the interests of the plaintiffs, and in making its Conclusion of Law Number III that none of the rights granted defendant Fidelity Gas Company under the Fidelity Operating Agreements have been abandoned by Fidelity Gas Company.

(6) The Court erred in making its Finding of Fact Number XXIII that the plaintiffs remained silent and made no claim that the Fidelity Operating Agreements had expired or had been terminated until the filing of this action on February 2, 1953.

(7) The Court erred in making its Finding Number XXV that all of the development and other activities carried on by the defendants were performed in reliance on the belief that the Fidelity Operating Agreements covering plaintiffs' interests were valid, subsisting agreements and in full force and effect.

(8) The Court erred in making its Finding Number XXVI that it was not until the value of plain-

tiffs' interests had been greatly enhanced and their oil producing possibilities demonstrated by the development work and expenditures of the defendants that any claim was made by plaintiffs to the defendants that the Fidelity Operating Agreements were no longer in effect.

(9) The Court erred in making its Finding of Fact Number XXVII that if the relief prayed for by the amended complaint is granted, the future development for the production of oil from the Cedar Creek Anticline, as now planned and carried on by defendant Shell Oil Company, will be impaired.

(10) The Court erred in making its Conclusion of Law Number IV that the plaintiffs are guilty of laches and barred from obtaining a judgment and decree cancelling or forfeiting Fidelity Operating Agreements.

(11) The Court erred in making its Conclusion of Law Number V that the plaintiffs are estopped from obtaining a judgment and decree of the Court cancelling or forfeiting the Fidelity Operating Agreements.

(12) The Court erred in making its Conclusion of Law Number VI that plaintiffs have waived any right to obtain a judgment cancelling or forfeiting the Fidelity Operating Agreements.

(13) The Court erred in failing to hold that the Fidelity Operating Gas Agreements expired by their own terms by reason of the failure of Fidelity Gas Company to drill exploratory wells within a reasonable time after the completion of the first three wells.

(14) The Court erred in not finding that Fidelity Gas Company abandoned its right under the agreements involved.

(15) The Court erred in not finding that it was the duty of the defendant Fidelity Gas Company to diligently and within a reasonable time continue exploration for oil in the deeper sands, that the only consideration for the Fidelity Gas Agreement was the exploration and drilling for oil by Fidelity Gas Company, and that failure to diligently and within a reasonable time continue exploration for oil in the deeper sands terminated the said agreements.

(16) The Court erred in excluding oral testimony as to the circumstances under which Paragraph IV of the Fidelity Agreements were negotiated.

(17) The Court erred in not holding that there was no relationship between the drilling of the Carter Oil Well and the Husky Well to the drilling contemplated under the Fidelity Gas Operating Agreements, and not holding that there was no drilling under the Fidelity Gas Operating Agreement after July, 1938.

(18) While the Court correctly held that the Fidelity Gas Operating Agreement was an option, it erred in not finding that the option had not been exercised by Fidelity Gas Company and therefore, the Fidelity Gas Operating Agreement had expired many years prior to the commencement of this litigation.

(19) The Court erred in failing to find that the defendants are estopped from claiming any interest under the agreements here involved.

(20) The Court erred in failing to find that defendants had waived any right to claim any interests under the agreements here involved.

(21) The Court erred in failing to find that defendants were barred by laches from claiming any interests under the agreements here involved.

(22) The Court erred in not finding that defendants Fidelity Gas Company and Montana-Dakota Utilities Company had full knowledge long prior to the making of the agreement by the said two defendants with the Shell Oil Company, that said defendants had no rights or interests under the Fidelity Gas Operating Agreements to any of the lands or interests of the plaintiffs.

(23) The Court erred in failing to find that Shell Oil Company had notice prior to the making of the agreement with the defendants Fidelity Gas Company and Montana-Dakota Utilities Company that said companies had no interests in or claim to the lands or leases of the plaintiffs.

Dated this 26th day of September, 1956.

/s/ LEIF ERICKSON

Attorney For Appellants

[Endorsed]: Filed Sept. 29, 1956. Paul P. O'Brien, Clerk.

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Brief of Appellants

United States Court of Appeals

for the Ninth Circuit

No. 15293

CEDAR CREEK OIL AND GAS COMPANY, a corporation,
INTERNATIONAL TRUST COMPANY, a corporation,
H. C. SMITH, SUSAN M. WIGHT and W. B. HANEY,

Appellant,

vs.

FIDELITY GAS COMPANY, a corporation, MONTANA-
DAKOTA UTILITIES COMPANY, a corporation, and
SHELL OIL COMPANY, a corporation,

Appellees.

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Brief of Appellants

United States Court of Appeals *for the Ninth Circuit*

No. 15293

CEDAR CREEK OIL AND GAS COMPANY, a corporation,
INTERNATIONAL TRUST COMPANY, a corporation,
H. C. SMITH, SUSAN M. WIGHT and W. B. HANEY,

Appellant,

vs.

FIDELITY GAS COMPANY, a corporation, MONTANA-
DAKOTA UTILITIES COMPANY, a corporation, and
SHELL OIL COMPANY, a corporation,

Appellees.

JURISDICTION

Appellants commenced this action in the District Court of the Sixteenth Judicial District of the State of Montana, in and for the County of Fallon, to quiet the title of the appellants to certain lands and leases situated in Fallon County, Montana. The action was removed to the United States District Court on the grounds of diversity of citizenship of the parties. There is diversity of citizenship and the amount in controversy exceeds \$3,000.00 and the District Court and this Court have jurisdiction under Title 28, U. S. C. A., Section 1332.

STATEMENT OF THE CASE

Appellants are the owners of certain lands and leases along the geological structure known as the Cedar Creek Anticline in Fallon County, Montana. Appellee Montana-Dakota Utilities Company, and the appellants, or their predecessors entered into separate but identical agreements in 1934 and prior thereto for the inclusion of their lands in a certain gas unit for the production of gas from their lands in the horizons above 2,000 feet. Contemporaneous with the execution of the Gas Unit Agreements, the parties entered into Gas Purchase Agreements under which appellants, or their predecessors agreed to sell the gas produced from their lands under the Unit Agreements to defendant Montana-Dakota Utilities Company.

In 1934, separate but identical agreements, herein referred to as the Fidelity Operating Agreements, were made

between the appellants, or their predecessors and appellee Fidelity Gas Company, a wholly owned subsidiary of appellee Montana-Dakota Utilities, under which the horizons below 2,000 feet in the lands here involved were committed by the appellants, or their predecessors for the purpose of exploration and drilling for oil and for the production of oil. No provision for the payment of rentals or or delay rentals in cash was contained in the agreement.

In 1951, an agreement was entered into between the appellees, Montana-Dakota Utilities, Fidelity Gas and Shell Oil Company under which appellees contend these lands, with others, were committed by the first two appellees to an agreement with Shell under which the latter company was to explore and drill for oil and produce oil from the lands.

By the first cause of action, each appellant alleges that appellees claim an interest in their lands and leases by reason of the Fidelity Agreements. By the second cause of action, each appellant alleges that appellees claim some interest in their lands under the Gas Unit Agreements. Appellants allege that the claims of the appellees are invalid, without any right whatsoever, and ask a decree quieting title in the appellants in their respective lands and leases.

By their answers, the appellees claimed possession of the lands under the Fidelity Agreements, the Gas Unit Agreements, the Gas Purchase Agreements, and the agreement

between appellees Montana-Dakota Utilities Company, Fidelity Gas and Shell Oil Company. Appellees also plead estoppel, waiver and laches.

Appellants, after obtaining leave of Court, filed their reply in which the validity of the agreements is denied. The reply alleges first that the Fidelity Agreements were options which have expired by their own terms by reason of the failure of Fidelity Gas Company to drill further wells within a reasonable time, after completion of drilling of three wells prior to December 1, 1937; second, if the agreements did not terminate by their own terms, appellee Fidelity Gas abandoned its rights under the agreements; third, if the agreements did not terminate by their own terms, and if they were not abandoned, Fidelity Gas' rights terminated because it was the duty of the appellee to diligently and within a reasonable time continue exploration for oil in the deeper sands; fourth, that the appellees are estopped to claim under the Fidelity Agreements.

The reply also attacked the validity of the Unit Agreements the Gas Purchase Agreements, but upon the pre-trial conference, the validity of these agreements was removed as an issue and appellants' contention with respect to these agreements was limited to the claim they only applied to the horizons known as the Judith River Sands. In this latter contention, the Court found for appellants. (Finding XXIX). (Tr. 198).

As stated by the Trial Court in its memorandum, the principal issue to be determined by the suit is whether the

Fidelity Operating Agreements are still in full force and effect. The Fidelity Operating Agreements are before the Court as Defendants' Exhibit 2. The main contentions of the parties before the Trial Court, and here are; appellants contend the Fidelity Operating Agreements are subleases in the form of option or "unless" leases subject to the usual rules applicable to such oil and gas leases while appellees contend that the agreements are Operating Agreements, not subject to the usual rules applicable to such oil and gas leases and that the agreements could only be terminated by notice of forfeiture.

The Trial Court found that the agreements were, in fact, subleases granting to appellee Fidelity Gas Company the option to keep the subleases alive by drilling in accordance with the terms of the agreement. (Finding of Fact XII, XIV). (Tr. 192). The Court concluded, as a matter of law, that there was not sufficient evidence to determine whether the option had been exercised in accordance with the agreement (Conclusion of Law No. II) (Tr. 200), and in its memorandum determined that further evidence on the question would have to be taken if the case were to turn on this point. (Tr. 176). The judgment was not based on this point, however. The Court determined that appellants were estopped to question the continuing validity of the Fidelity Operating Agreements and held the agreement to be in full force and effect, and that appellants held their lands subject to them. Memorandum

(Tr. 195, 196, 197, 198) (Conclusions IV, V, VI) (Tr. 200).

The lands are located approximately in the center of a narrow geologic structure some 65 or more long known as the Cedar Creek Anticline. Leasing for production started before 1920. Gas wells were drilled in the 20's by John Wight and his group, appellants Cedar Creek and Minnesota Northern Power, a predecessor of appellee Montana-Dakota Utilities. Wight and his associate, by 1925 or 1926 had leases on something like 85,000 acres in the Cedar Creek field. (Tr. 239). A pipeline was built by a predecessor of appellee Montana-Dakota Utilities Company. (Tr. 242). The only market for the gas was through this pipeline. Gas was produced by Minnesota Northern from lands adjacent to those of Wight and others, so Wight and his associates were required to pay compensatory royalties on their federal leases. (Tr. 242). Minnesota Northern or its successor, Gas Development Company, would not take gas from appellants or their predecessors unless they would agree to unitize their lands. (Tr. 243). In about 1931 a move was initiated to unitize the upper or Judith River Sands, finally resulting in the execution of the Unit and Gas Purchase Agreement referred to above. Nine units were established, No. 1 at the north end and No. 8 at the south. The lands and leases of appellants lie in Unit 5.

At about the same time, Montana-Dakota Utilities created its wholly owned subsidiary, Fidelity Gas, as an

oil production company, and the Fidelity Operating Agreements were negotiated with appellants and others in 1934. The record shows that appellants and their predecessors entered into all of these agreements reluctantly and only to save their federal leases. (Tr. 246).

It is undisputed that three wells were drilled by Fidelity Gas pursuant to the Fidelity Operating Agreements by January, 1938, two in Unit 8-B and one on lands of appellant Cedar Creek Oil and Gas in Unit 5. (Tr. 542). The Unit 5 well was a dry hole. There was some production from the Unit 8-B wells through 1938, but none thereafter. Tr. (542). No further drilling was done until Carter Oil Company drilled a well in Unit 8-B, about 35 miles south of the lands of the appellants, commenced in May of 1941 and completed early in January, 1942. No more drilling was done until a well was drilled by Husky Oil and Refining Company under an agreement with Fidelity Gas, commenced on May 13, 1949 and completed July 29, 1949. It is the position of the appellants that neither of these wells was drilled under the Fidelity Operating Agreements as they applied to appellants' lands.

Both wells were dry, and the next well that was drilled was commenced by Shell Oil Company on July 8, 1951, in the Pine Unit, north of Unit No. 1 and some 25 miles north of the lands of the appellants.

There is testimony as to continuing negotiations between Montana-Dakota Utilities and Fidelity with others seeking to interest them in drilling along the Cedar Creek Anti-

cline, but the Court determined that this was not drilling within the Fidelity Agreements. (Tr. 176).

Shell proceeded with the drilling of wells on the Cedar Creek Anticline after it had entered into its agreement with appellees Fidelity and Montana-Dakota Utilities. At the time the instant suit was filed, 11 wells had been commenced or drilled on the anticline. Of these, eight were in the Pine Unit about 25 miles north and west of Unit 5, and two were in Unit 8-B, approximately 30 miles south and east of Unit 5. The last well, started three weeks before the filing of this suit, was in Unit No. 3, known as the Cabin Creek Unit, approximately 11 miles north and west of the lands involved. (Defendants' Exhibit 60).

The Fidelity Operating Agreements (Defendants' Exhibit 2) upon which the basic claim of interest in the appellee rests is entitled "Operating Agreement." The granting clause recites that the first party "does hereby devise and sublease and sublet" to the second party certain lands and leases. The Court found the agreements to be leases. (Finding No. XIII. (Tr. 192). Section 2 of the agreement provides a method of declaring a forfeiture for failure to perform the lessees obligations under the contract.

Section 4, when read with the rest of the agreement, makes the agreement one in effect an option or "unless" type oil lease. (Finding No. XIV). Memorandum. (Tr. 175). Because of its importance, the section is here set out:

"4. After completion or abandonment of said test well, second party shall have the right, at its option,

to prosecute such further drilling of wells under like terms and conditions, and at such times as shall be deemed by it to be good oil field practice, having due regard that the drilling operations hereunder are purely exploratory and speculative, and also having due regard to weather and road conditions. In the event that under customary oil field practice in prospecting a wild cat area, second party shall be unable to commence the drilling of a new test well before September first of any year, the commencement of any such well may be deferred, at the option of the second party, until the following first day of April."

There is much evidence in the record that appellees Fidelity Gas and Montana-Dakota Utilities Company abandoned any rights it now claims to have under the Fidelity Operating Agreements. The Trial Court, by its Finding of Fact No. XXII, (Tr. 196) determined there was no abandonment.

The judgment was based on findings that appellees were estopped to question the validity of the Operating Agreements; that appellants had waived their rights to contend the Fidelity Operating Agreements were no longer in force, and that appellants were guilty of laches in asserting their claims. On these points the record shows affirmatively that from 1938 to 1951 there was no communication of any kind from Fidelity or Montana-Dakota Utilities to any of these appellants, indicating that either Fidelity or Montana-Dakota Utilities were claiming any interests in the lands by reason of the Fidelity Operating Agreement. (Tr. 277, 421, 373, 386). The appellants, who were witnesses, all

testified positively that they assumed the agreements had long since terminated. (Tr. 277).

On April 27, 1951, the Montana-Dakota Utilities wrote a letter to the appellants advising them of the agreement between the defendants Montana-Dakota Utilities and Fidelity on the one hand and Shell on the other, and that Shell would proceed with drilling operations within 90 days. Receipt of this letter, appellants testified, was the first information any had had after 1938 that Fidelity and Montana-Dakota Utilities claimed the agreements were still in effect. (Tr. 277, 376, 395, 420).

As will be shown in the discussion of the question of estoppel, appellees knew appellants were contending at all times that the Fidelity Agreement had expired. On July 16, 1951, Appellant H. C. Smith sent by registered mail, a Notice of Cancellation of the Fidelity Agreement. A similar letter was sent to Fidelity and Montana-Dakota Utilities by appellant Cedar Creek on September 12, 1952. (Exhibit 21). (Tr. 420, 433). An agent of defendant Shell discussed with appellants leasing of the lands from appellants. This suit was filed on February 2, 1953. The Trial Court, by its Finding of Fact No. XXII, held that appellants remained silent and made no claim that the Fidelity Agreement had expired or had been terminated from April, 1951, until the filing of this action on February 2, 1953.

The facts in the case and the pleadings will be further stated in the sections of the brief devoted to the particular questions.

BASIC QUESTIONS PRESENTED

- (1) Are appellants estopped by their conduct from claiming the Fidelity Agreements had terminated?
- (2) Did appellants waive any right to claim the Fidelity Agreements had terminated?
- (3). Were appellants guilty of laches?
- (4) Did the appellees exercise the option to drill and thus keep the Fidelity Agreements alive?
- (5) Did the Fidelity Agreements terminate by reason of the failure of appellees to diligently pursue drilling after the drilling of the first three wells, completed in 1937?
- (6) Did appellees abandon any rights they might have had under the Fidelity Agreements?
- (7) Were appellees estopped from claiming the Fidelity Agreements were still in effect?
- (8) Were appellees barred by reason of laches from claiming the Fidelity Agreements were still in effect?

SPECIFICATIONS OF ERROR

- (1) The Court erred in its ultimate conclusion that appellees were entitled to judgment and in entering such judgment. See comments as to Specification of Error No. 2.
- (2) The Court erred in making its Conclusion of Law No. VII as follows:

"The Fidelity Operating Agreements, Gas Purchase Agreements and Cooperative or Unit Plan of Development, Unit No. 5, Cedar Creek Anticline, all as more fully described in the second defense of defendants' answer to all causes of action alleged in the amended complaint, are valid, subsisting and in full force and effect as between the plaintiffs and these defendants."

By its Finding of Fact No. XIV, the Court found the Fidelity Agreements to be options which would ipso facto terminate upon the failure of the appellees to exercise the option by drilling. The drilling of two wells in a fourteen year period, 25 or 30 miles from the lands involved, was not sufficient drilling to exercise the option. The Fidelity Agreement being an option, it terminated by failure of the appellees to drill in accordance with its terms. The record shows the appellees abandoned any rights under the Fidelity Agreement prior to 1940. If the agreements did not terminate otherwise, they terminated by reason of the violation of the implied covenant to diligently drill and develop.

(3) The Court erred in making its Conclusion of Law No. VIII as follows:

"Plaintiffs, and each of them, hold and own their respective interests as defined in Findings I through VII, inclusive, subject and subordinate to all of the terms and conditions of the instruments described in the second defense of defendants' answer to all causes of action alleged in the amended complaint."

See comment as to Specification of Error above.

(4) The Court erred in making Conclusion of Law No. V as follows:

“Plaintiffs, and each of them, are estopped from obtaining a judgment and decree of this Court cancelling or forfeiting the Fidelity Operating Agreements to which they have committed their respective interests.”

This is not an action for the cancellation or forfeiture of the Fidelity Operating Agreements. The action is one to quiet title and to declare that appellants hold these lands clear of any claim by appellees under the Fidelity Agreements. Appellees failed to prove any of the necessary elements of an estoppel, and the Court erred in finding estoppel as a fact and in making its Conclusion of Law No. V.

(5) The Court erred in making its Finding of Fact No. XXIII that appellants remained silent and made no claim that the Fidelity Operating Agreements had expired or been terminated until the filing of this action on February 2, 1953.

The record shows appellants H. C. Smith and Cedar Creek Oil and Gas Company notified appellees by letter of their claims and that John Wight, during the period, offered these lands for lease to Shell.

(6) The Court erred in making its Finding of Fact No. XXVI that it was not until the value of appellants' interests had been greatly enhanced and the oil producing pos-

sibilities of their property demonstrated by development work and expenditure of appellees that any claim was made by appellants to the appellees that the Fidelity Operating Agreements were no longer in effect.

See comment as to Specification of Error No. 5 above.

(7) The Court erred in making its Finding of Fact No. XXI that the appellee Shell Oil Company, in accomplishing geological and geophysical surveys and in drilling a well, completed in January, 1952, did so in reliance on the validity of the Fidelity Operating Agreements as they affected the lands of these appellants.

This finding finds no support in the record.

(8) The Court erred in making its Finding of Fact No. XXV that all of the development and other activities carried on by the appellees were performed in reliance upon the belief that the Fidelity Operating Agreements covering appellants' interests were valid, subsisting agreements and in full force and effect.

There is no proof in the record that any of the activities of Shell in development and drilling activities were in reliance on the continuing effectiveness of the Fidelity Agreements as they affected appellants' lands, let alone any showing that would justify the finding that all of these activities were in reliance upon the Fidelity Agreements being in full force and effect insofar as appellants' lands are concerned at the time of these activities by Shell.

(9) The Court erred in making its Finding of Fact No. XXVII that if the relief prayed for by the amended complaint is granted, the future development for the production of oil from the Cedar Creek Anticline as now planned and carried on by appellee Shell will be impaired, and the benefit to be derived by appellees from development of appellants' lands will be lost.

It is true that if appellants prevail, appellee Shell will not be able to drill the lands of the appellants under its agreement with defendants Fidelity and Montana-Dakota Utilities. The record shows no drilling had been done within 12 miles of the appellants' lands. The closest well was a dry hole. The record contains no evidence that there is oil in the lands of the appellants. There is absolutely no proof that Shell's general activities in the Cedar Creek Anticline will be restricted or impaired by judgment for the appellants. At the time of the trial, their activities had been limited to areas many miles remote from the lands of the appellants.

(10) The Court erred in making its Conclusion of Law No. IV that appellants are guilty of laches and barred from obtaining a judgment and decree cancelling or forfeiting Fidelity Operating Agreements.

This suit was commenced 21 months after appellants had any notice appellees were claiming the Fidelity Operating Agreements were still in effect. This is not an unreasonable delay. Appellees knew appellants claimed the agreements

had terminated. There was no proof of reliance by Shell upon the continuing validity of the Fidelity Agreements as they applied to the lands of the appellants. Appellees have not been prejudiced by the delay in filing the suit.

(11) The Court erred in making its Conclusion of Law No. VI that appellants waived any right to obtain judgment and decree cancelling or forfeiting the Fidelity Operating Agreements.

This is not an action for the cancellation or forfeiture of the Fidelity Operating Agreements. The action is one to quiet title and to declare that appellants hold these lands clear of any claim by appellees under the Fidelity Agreements. Appellees failed to prove any of the necessary elements of a waiver, and the Court erred in finding waiver as a fact and in making its Conclusion of Law No. VI.

(12) While the Court correctly held that the Fidelity Operating Agreement was an option, it erred in not finding the option had not been exercised by the Fidelity Gas Company, and, therefore, the Fidelity Operating Agreement had expired many years prior to the commencement of this litigation.

Drilling a well 30 miles south of the lands of the appellants in 1941 and another in 1949 was not timely exercise of the option and was not drilling within the agreement.

(13) The Court erred in not finding that it was the duty of the appellee Fidelity Gas Company to diligently, and

within a reasonable time, continue exploration for oil in the deeper sands.

The only consideration for the Fidelity Operating Agreement was the exploration and drilling for oil and the failure to diligently, and within a reasonable time, continue exploration for oil in the deeper sands, terminated the agreements if the agreement had not terminated under the option provisions.

(14) The Court erred in excluding oral testimony as to the circumstances under which Paragraph 4 of the Fidelity Agreements were negotiated.

The witness John Wight was asked whether there were any discussions of paragraph 4 of the Fidelity Operating Agreement. Then he was asked: "What was the discussion?" (Tr. 254, 290).

The objection was as follows:

"We object to that as incompetent, irrelevant and immaterial; the agreement subsequent to that discussion was reduced to writing, signed by the parties, and speaks for itself." (Tr. 254).

Later, the question was asked:

"Q. Mr. Wight, calling your attention again to the circumstances at the time the Operating Agreement or Deep Test Agreement was negotiated with Fidelity Gas, was there any discussion at the time as what would happen in the event there was no success in the test?

A. Sure.

Q. What was the discussion?"

The objection was renewed in the following language:

"We object, may it please the Court, it is incompetent, irrelevant and immaterial; there is no issue in this case, no pleading to reform this agreement, and that the witness is now attempting to vary the terms of the written instrument by conversations that took place during negotiations, no proper foundation laid."

While the Court correctly held that by Paragraph 4 of the Fidelity Operating Agreements were in effect options, the paragraph is not so clear as to the time in which additional wells were to be drilled as to require the exclusion of the oral testimony.

(15) The Court erred in not finding that Fidelity Gas Company abandoned its rights under the Fidelity Operating Agreements.

While there is conflict in the testimony, the statements of the witnesses, together with the conduct of the appellees Fidelity and Montana-Dakota Utilities with relation to the lands of the appellants, conclusively establishes abandonment.

(16) The Court erred in not holding that appellees were estopped from claiming the Fidelity Agreements were subsisting agreements as to the appellants.

From 1938 to 1951 appellees maintained absolute silence. They lulled appellants into the belief, by their conduct and silence, that appellees were making no claim that the Fidelity Operating Agreements had not terminated. Relying

on this belief, appellants did not institute suits to quiet title.

(17) The Court erred in failing to hold that appellants hold their respective interest in the lands involved free and clear of any claims of appellees under the Fidelity Operating Agreements.

(19) The Court erred in not entering judgment quieting the title of appellants' lands against all claims of the appellees except as to such rights as they may have under the Gas Unit Agreements and Gas Purchase Agreements to the Judith River Sands.

ARGUMENT

For the purpose of the argument, the Specifications of Error need not be individually considered, but may be considered in groups. Because the case was decided on the point of estoppel, those Specifications of Error relating to it will be considered first.

The Specifications of Error with which this section of the brief are concerned, are Specifications of Error No. 1, 2, 3, 4, 5, 6, 7, 8 and 9.

I

ESTOPPELS ARE ODIIOUS AND FOUND FOR ONLY
THE MOST IMPELLING REASONS

A finding of estoppel precludes a determination of the case upon its merits. For that reason Courts find an estoppel only with reluctance and for the most impelling reasons,

and then only where every element is proven clearly, convincingly and satisfactorily. Typical of the attitudes of the Courts is the statement by the Montana Court in *Fiers v. Jacobson*, 123 Mont. 242, 250, 11 Pac. (2d) 968:

"Estoppels are odious, are not favored, and should be proven clearly, convincingly and satisfactorily.

"The doctrine must be applied with great care and the equity must be strong and the proof clear."

We ask the Court, in considering the question of estoppel, to bear in mind the further rule as stated in *Willard, et al v. Campbell, et al* 91 Mont. 493, 504, 11 Pac. 782:

"That time is of the essence of the contract so far as an oil and gas lease is concerned, even though it be not so stated therein, and that a forfeiture is favored where the lessee has failed to begin operations within the time required by the lease."

The record in this case discloses that appellants and their predecessors were pioneers in the development of the gas fields on the Cedar Creek Anticline. (Tr. 239). It shows that predecessors of Montana-Dakota Utilities refused to accept gas produced by appellants and their predecessors unless they would enter into the Unit Agreement, (Defendants' Exhibit 3) and the Gas Purchase Agreement, (Defendants' Exhibit 4); that appellants and their predecessors were being required to make compensatory royalty payments and that to save their lands and leases, appellants and their predecessors were forced to enter into these agreements and the Fidelity Operating Agreement. (Defendants'

Exhibit 2). (Tr. 242, 243). Examination of the terms of the agreements, and particularly the Fidelity Operating Agreement, Section 9, reveals that appellants and their predecessors were indeed in desperate circumstances when they would enter into agreements so unfavorable in their terms to the land and lease holders. By the terms of the Fidelity Operating Agreements, the only consideration running to appellants was exploration, development and production in the optimistic hope that in spite of all the charges provided in Section 9 of the Fidelity Operating Agreements, there might some day be some net profit to the appellants.

Under the Fidelity Operating Agreement, three wells were drilled prior to January 1, 1938. (Tr. 544-545). Regular reports of activities under the Fidelity Operating Agreements were sent by appellee Fidelity Gas to appellants and their predecessors through 1937, (Plaintiffs' Exhibit 12) (Tr. 261), but from that time to April, 1951, when the letter (Exhibit 26) was mailed by appellees, neither Fidelity nor Montana-Dakota, by word or action, indicated in any manner that they claimed the Fidelity Operating Agreements to be in effect as to appellants' lands. (Tr. 277, 373, 386, 421). The testimony that appellants in good faith thought the agreements had terminated immediately after drilling of the three wells prior to January 1, 1938, is clear, convincing and absolutely uncontradicted, and may not be ignored. (Tr. 270, 271, 272, 273, 384, 385, 419, 420, 421).

From January 1, 1938 to July 8, 1951, a period of more than 13 years, neither Fidelity Gas nor Montana-Dakota Utilities did any seismic, exploration or drilling work to the deeper sands anywhere on the entire Cedar Creek Anticline. (Tr. 607). A well was drilled by the Carter Oil Company under an agreement with Fidelity 30 miles south of the lands of the appellants in 1941. It was a dry hole. The Husky Oil Company drilled a well in 1949 close to the Carter well, it also being a dry hole. This was the extent of the drilling or exploration over a period of more than 13 years, and even this drilling, in view of the appellants, had no relation to the Fidelity Agreements as they applied to the lands of the appellants. We believe the testimony as to abandonment is clear and convincing, but even if it is disregarded, we earnestly contend that under a contract like the Fidelity Operating Agreement, the only consideration flowing to the landowners is exploration, drilling and production, and where, as found by the Court, this Fidelity Operating Agreement is clearly an option agreement, this drilling could not possibly be sufficient to keep the Fidelity Operating Agreement alive.

The holding that appellants are estopped results in appellees retaining in effect, a lease made in 1934 without the expenditure of a penny from 1938 to date for exploration, drilling or development and without any drilling or exploration on the lands of the appellants, or within 30 miles of the lands of the appellants from January, 1938 to July 8, 1951, and no drilling within 10 miles of the lands

of the appellants from January 1, 1938 to the date of the trial. Clearly, only the most extraordinary circumstances in the light of this record would justify a determination of estoppel which precludes a determination of the case upon its merits.

With these preliminary observations as to the question of estoppel we turn to a detailed consideration of the record on the point.

II

NONE OF THE ELEMENTS OF ESTOPPEL APPEAR IN THIS RECORD

By its Findings Numbered XXI, XXIII, XXIV, XXV, XXVI and XXVII, Record 195, 196, 197, 198, 199, 200, the Trial Court found that the appellees Shell Oil Company, in reliance on the validity and effectiveness of the Fidelity Operating Agreements, (Defendants' Exhibit 2) induced by the silence of the appellants after the receipt by the appellants of the letter dated April 27, 1951, (Plaintiffs' Exhibit 26) expended large sums of money in geophysical and drilling activities on the Cedar Creek Anticline, and by reason of the silence of the appellants, and their failure to make claim that the Fidelity Operating Agreements had expired or been terminated prior to the filing of the action of February 2, 1953, the appellants are estopped from contending the agreement had expired and from securing judgment.

The elements of an estoppel are stated in 93-1301-6, R. C. M. 1947, *Subsection 3*, as follows:

"Whenever a party has, by his own declaration, act or omission intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act or omission, be permitted to falsify it."

The Montana Supreme Court in *Waddell v. School District No. 2*, 74 Mont. 91, 96, 238 Pac. 884, spelled out in detail the essential elements of an estoppel:

"In general, to constitute an equitable estoppel, the following elements are requisite: (1) The party to be estopped must be possessed of knowledge of the true facts or conditions; (2) He must intend that his statements or conduct shall be acted upon or must so act that the party asserting the estoppel had a right to believe that he so intended; (3) The party on the other side must be ignorant as to the true state of facts; and (4) must rely upon the representation made or conduct of the party to be estopped. An essential element to the creation of an equitable estoppel is that *the person asserting it must show affirmatively* that he was misled to his prejudice by reason of the representations or conduct of another, respecting material matters as to which he had no personal knowledge or means of knowledge, and that he acted in reliance thereon. It involves an element of falsehood or fraud, both of which are abhorred by the law and is applied to protect a person from loss or damage in consequence of reliance placed upon the representations or inducements made by another by acts or words. 'It is elementary before anyone can invoke the doctrine, he must show that he was misled to his prejudice by the conduct of which he complains'." (Emphasis supplied).

The essential elements are more briefly stated in *Gypsy Oil Company v. Marsh, Oklahoma* 248 Pac. 329, 48 A. L. R. 876, 886:

"The essential elements of an equitable estoppel are: First, there must be a false representation or concealment of facts; second, they must have been made with knowledge, actual or constructive, of the real fact; third, the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; fourth, it must have been made with the intention that it should be acted upon; fifth, the party to whom it was made must have relied on or acted upon it to his prejudice."

A further rule, preliminary to a discussion of the facts in this case on estoppel, is that every essential element must be present before there can be an estoppel. In *Gerard v. Sanner*, 110 Mont. 71, 80, 103 Pac. (2d) 314, the Montana Court said:

"This court has said, however, that all of the usual elements must be found to exist; otherwise estoppel does not arise. (*Lindbloom v. Employers' Liability Assurance Co.*, 88 Mont. 48, 295 Pac. 1007)."

The author in 31 C. J. S. 256 states the rule thus:

"There can be no estoppel if any of the requisite elements thereof are wanting. They are each of equal importance."

A further general rule is that the burden of proof is on the one claiming the estoppel to prove the existence of all

of the necessary elements. The Montana Court in *Fiers v. Jacobson*, 123 Mont. 242, 252, 11 Pac. (2d) 968, *supra*, had this to say:

"Estoppels are odious, are not favored and should be proven clearly, convincingly and satisfactorily."

In 31 C. J. S. 455, it is said:

"Where a party relies upon an estoppel in pais * * * the burden is on such party to prove the essential elements of such an estoppel."

Further, in 31 C. J. S. 457, the author says:

"Every fact essential to an estoppel must clearly and satisfactorily proved by the preponderance of the evidence. Where the evidence is evenly balanced, the burden of proof * * * is not sustained.

"Estoppels cannot be based upon mere conjecture; and facts alleged to constitute them will not be taken by argument, inference or intendment."

See also *Waddell v. School District No. 2*, *supra*.

In *Mackey Wall Plaster Company v. U. S. Gypsum Company*, D. C. Montana, 244 Fed. 275, Affirmed 252 Fed. 397, 164 C. C. A. 321, Judge Borquin stated the rule as follows:

"He who alleges waiver and estoppel must clearly and satisfactorily prove all the necessary facts and elements. Mindful that defendants' testimony is of two witnesses and plaintiffs of but one, circumstances tend to establish at least equipoise between them, and so defendant has not sustained the burden of proof imposed upon it by its defense."

With these general observations as to the rules applicable, let us examine the record to see whether the appellees, or either of them, have sustained the burden of proving clearly and convincingly all of the essential elements of an estoppel.

Obviously, none of the elements of estoppel exist insofar as the appellees Fidelity Gas and Montana-Dakota Utilities Company are concerned, and that clearly is the conclusion of the Court.

All of the Court's references in its findings, its memorandum and in its conclusions relate solely to Shell. By its memorandum, (Tr. 179) the Court said that it was Shell who, in reliance upon the validity of the agreements, undertook expensive drilling operations and that it was Shell that was planning to expend money for drilling in reliance on the validity of the Fidelity Agreement. (Tr. 180). By Findings No. XXI, XXIII, XXV and XXVII, the Court makes it absolutely clear that it is only as to Shell that the Court found the existence of the estoppel and no other conclusion could be reached. The record shows that neither Fidelity nor Montana-Dakota Utilities expended one cent for oil exploration or development after 1938. (Tr. 607). Neither one prejudiced its position in any way by entering into the agreement with Shell. (Appellees' Ex. 5). These two appellees knew all the facts known to appellants. The agreement was drawn by them. (Tr. 583). As between appellants and appellees, Fidelity Gas and Montana-Dakota Utilities there could be no estoppel.

DID SHELL PROVE AFFIRMATIVELY THAT IT ENTERED INTO ITS AGREEMENT WITH FIDELITY AND MONTANA-DAKOTA UTILITIES IN RELIANCE ON A BELIEF THAT THE FIDELITY OPERATING AGREEMENTS WERE IN EFFECT AS TO APPELLANTS' LANDS?

The first essential of estoppel is reliance by the one claiming the estoppel on the action or non-action of the one sought to be estopped. There is no direct testimony in the record that Shell would not have made its agreement with Montana-Dakota Utilities and Fidelity, or that it would not have gone ahead with the drilling on the Cedar Creek Anticline, all of which at the time of the filing of the suit was at a distance of more than 25 miles to the north and 35 miles to the south of the lands here involved if, in fact, the Fidelity Operating Agreements had expired as to the lands here involved. There is pleading of reliance by Shell, and there is much by way of argument of counsel as to reliance by Shell, but the record is barren of any testimony that Shell would not have made the agreement with Fidelity and Montana-Dakota Utilities or drilled the wells it had drilled except for its reliance upon the validity of the Fidelity Agreements insofar as these appellants are concerned.

The only representatives of Shell called as witnesses were T. R. Barnes, its geologist, (Tr. 659) and E. G. Christianson, one of its engineers, (Tr. 689) neither of whom apparently participated in any way in making the agreement between Shell and the co-appellees. Barnes was called as

an expert on the geological formation and to testify as to wells drilled and to certain costs. Christianson was called to testify as to the number of wells drilled, as to the production and as to costs.

Failure to call a witness who participated in the negotiations on behalf of Shell raises the presumption that the testimony, if produced, would not support the appellees' case.

As to parties who fail to testify to facts material to their case, the rule is stated in 31 C. J. S. 860, as follows:

"... as a general rule, the non-appearance of a litigant at the trial, or his refusal or failure to testify as to facts material to his case, and peculiarly within his knowledge, creates an inference that he refrained from appearing or testifying because the truth if made to appear would not aid his contention."

The same rules applies to witnesses, as stated in 31 C. J. S. 853:

"The unexplained failure of a party to call or examine an available witness who possessed peculiar knowledge may give rise to an inference that the testimony of such witness would not sustain the contention of the party."

These appellees are not indigent. They are represented, as the record will show, by extremely able counsel. The stakes in this suit are high. No explanation was given of the failure of the appellees to call officers of the defendant Shell who negotiated the agreement. The only logical in-

ference to be drawn is that the witnesses, if called, would have to testify that there was no reliance by Shell when it made the agreement, (Appellees' Ex. 5) upon the continued effectiveness of the Fidelity Operating Agreements to the lands here involved.

The entire direct testimony on the question of reliance on the validity of the Fidelity Operating Agreement is set forth in Transcript 681, 682, where the witness Barnes was asked this question:

"Q. When your company went into the Cedar Creek Anticline on its seismic work, was it of value that all of the lands, or a large portion of the lands were blocked up under the Fidelity Operating and other agreements?"

and in reply said:

"A. In our exploration program, we must acquire lands prior to very expensive exploration such as our seismic efforts, so that when we find what we call a drillable location, we have control of those lands, and if we have to pick them up 40 acres by 40 acres, a greater time is consumed than if we are able to acquire them as we did in these unit agreements, many thousands of acres. Our program was able to expand very rapidly and cover the area."

This is all there is. Barnes said it was of value to control lots of land. He said time could be saved by acquiring lots of land under one agreement. This is a far cry from carrying the burden of proving that if Shell had not relied

on the validity of the Fidelity Operating Agreements it would not have embarked on its highly successful drilling program on the Cedar Creek Anticline.

Nor is there anything about the record which supplies the absence of this testimony. The Shell-Fidelity-Montana-Dakota Agreement (Defendants' Ex. 5), relates primarily to Units 8-A and 8-B of the Cedar Creek Anticline, an area extending from 20 to 35 miles southeasterly from the lands of the appellants. As in the case of the prior agreements with Carter and Husky (Defendants' Ex. 43, 44, 45), (Tr. 610, 612), the principal interest of Shell was in that area. The trial of this cause was held on April 14, 15 and 16, 1955, four years and four days after the signing of the Shell-Fidelity-Montana-Dakota Agreement and Shell had not drilled one well in the township in which these lands are situated. (Tr. 180). To the north, approximately 10 miles from the lands involved, a well was drilled in Section Four (4), Township Nine (9) North, Range Fifty-Eight (58) East, which was completed on July 1, 1954. (Defendants' Ex. 60). To the south, the closest drilling, a dry hole, was in Section Twenty-Two (22), Township Six (6) North, Range Sixty (60) East, about 14 miles south of these lands. (Defendants' Ex. 60). Of the eleven wells drilled or started prior to the filing of this action, February 2, 1953, eight were in the Pine Unit which is at least 25 miles north of any lands with which we are here concerned, and the other three in Township Four (4) North, Range Sixty-One (61) East, about 30 miles south of the

lands involved. Certainly at the time Shell embarked on its drilling program, little thought was given to appellants' lands.

A finding of reliance, we submit, rests on "mere conjecture and argument" contrary to the rule as epitomized in the quotation from 31 C. J. S. 457, *supra*.

Among the findings upon which the Court relies for its conclusion that appellants relied upon the belief of continuing validity of the Fidelity Agreement and are estopped are Finding No. XXV, (Tr. 197) that all of the development and other activities carried on by the appellees were performed in reliance on the fact that the Fidelity Operating Agreements covering appellants' interests were valid, subsisting and in full force and effect; and Finding No. XXVII, (Tr. 198) to the effect that the future development of the production of oil from the Cedar Creek Anticline by appellee Shell would be impaired and the benefit to be derived by the appellees from the development of appellants' land will be lost.

Further the Court found that Shell had spent approximately \$12,000,000 on geological surveys and in drilling (Finding No. XXI), that all of Shell's activities were in reliance on the validity of the Fidelity Agreements as they affected appellants' lands (Finding No. XXV), and that if the Fidelity Agreements have expired as to appellants' lands Shell's program on the Anticline will be impaired and the benefits to be derived by Shell from the development of appellants' lands will be lost.

First, these findings are not justified because the total acreage of the appellants, approximately 4,500, is small compared to the total area covered by the agreement between Shell on the one hand and Fidelity and Montana-Dakota on the other. This case is entirely dissimilar from most estoppel cases in the oil and gas field where the drilling and development work which the owner permits to go on without a claim of title is on the very lands themselves. Under *Bowes v. Republic Oil Company*, 78 Mont. 134, 143, 252 Pac. 800, to be described later, unless the development and drilling work is on the lands of the owners, there can be no estoppel. Be that as it may, the record shows that the Shell-Fidelity-Montana Dakota Utilities Agreements cover all of the lands in which Fidelity and MDU have an interest under the Fidelity Operating Agreements, its leases from the Northern Pacific Railway Company, its fee lands, its federal leases, the state leases, and its leases from individuals. The Northern Pacific Railway owns every other section in all of the units except Unit 5, where it owns only a few tracts, (Tr. 522, 575, 605) and all of these lands are committed to the Shell-Fidelity-MDU Agreement. (Defendants' Ex. 5). The Shell-Fidelity-MDU Agreement (Ex. 5) purports to cover all of the lands, or practically all, in all nine units. In addition, the agreement covers lands at least in the Pine Unit which was not within the unitized area of the Cedar Creek Anticline. While no witness testified as to the exact acreage involved, examination of the map (Ex. 1-A) which was considered by the

Court by stipulation upon the pre-trial conference, together with the testimony of the witnesses, shows the total acreage covered by the Fidelity Operating Agreements, in these nine units alone would exceed an absolute minimum of 120,000 acres. The lands of the appellants could not exceed 3% of the total area covered by the Shell-Fidelity-MDU Agreements, and that 3% is in Unit 5 that had been condemned in the words of the Vice-President of MDU, Cecil Smith by the drilling of the Warren well in 1937. (Tr. 610).

The witness Smith testified that he did not insist on the inclusion of Unit 5 in his original deals with Carter and Husky because of the adverse results of the Warren well drilled in that unit he felt that insistence on inclusion of Unit 5 would make it more difficult to make a deal with Husky and Carter. (Tr. 610, 611, 612). He also concluded that as the result of the drilling of the two wells by Fidelity and the two wells by Carter and Husky in Units 8-A and 8-B, prospects for production there were good and it is, of course, there and in the Pine Unit that Shell has concentrated its drilling.

The relatively small acreage of the appellants, coupled with the concentration of activities in areas remote from the lands of the appellants, results in no other conclusion than that the Court's findings that all of the development and other activities of Shell were performed in reliance on the belief on the part of Shell that the Fidelity Operating

Agreements were valid and subsisting as they related to appellants' lands cannot be sustained.

What is said above has equal application to Finding No. XXVII that future development for the production of oil on the Cedar Creek Anticline by appellee Shell will be impaired. No one testified that the filing of the suit had slowed down Shell at all, and Defendants' Exhibit No. 2 shows the carrying on of a very aggressive drilling program.

There is not a word to show impairment of the whole program. The most that can be concluded is that if drilling in Unit 5, which had not occurred at the time of the trial, should prove that the lands of the appellants bear oil, Shell would lose the right to take production from those lands.

Further, there is substantial question whether findings that Shell made expenditures, like Finding No. XXIII (Tr. 126) and Finding XXVI (Tr. 126) are justified. In the case of an ordinary oil and gas lease, the lessee takes all the risk. He puts up all the money for exploration, drilling and production. This is not the case under the Fidelity Operating Agreements. These agreements, while leases, are entirely unlike an ordinary oil lease insofar as the payment of costs of exploration and drilling and the division of income are concerned. Under these agreements, and particularly Section 9, see Appendix below, all of the expenditures of every nature made by Shell for exploration, drilling, development, production and including provision for working capital, interest, overhead, operating costs and

every other conceivable item of expense are to be paid from production, and this is to be paid before appellants can get anything. Moneys paid by Shell are, in fact, advances, and not expenditures in the ordinary sense. Shell's drilling program has been most successful. Of 44 wells completed at the time of the trial, only seven were failures. The rest are very substantial producers (Defendants' Ex. 60). Even if the other elements of estoppel do

Appendix 1

9. Subject to said right to be first reimbursed for all expenditures, outlays and any obligation made or incurred by it in carrying on all exploration, drilling, production and other operations hereunder, second party shall furnish the necessary working capital and/or provide for all labor, machinery, apparatus, equipment, materials and supplies; all tools, casing, pipe, tubing, and fittings; services and facilities necessary to properly carry on said exploration, development and production operations; and for managing and operating the lands, leases, wells, personal property and all production in connection with the field insofar as the lands herein described are concerned. Except as herein otherwise expressly provided, second party shall be entitled to be first reimbursed for all expenditures, outlays and obligations incurred in said operations out of the first proceeds received from the sale of oil and/or gas and other hydrocarbons produced by said operations, and without limiting the generality of the foregoing, said expenditures, outlays and obligations for which second party shall be reimbursed out of the gross proceeds of the production resulting from its operations hereunder, shall specifically include the following items: **FIELD EXPENDITURES:** Cost of all services in the field, including field superintendence, field accounting and reasonably necessary geological work; cost of construction, drilling, transportation, maintenance, repairing and dismantling; cost of treating, transporting and manufacturing, production and equipment; cost of all tools, machinery, apparatus, pipe, casing, tubing, fittings, materials, supplies and equipment of all kinds, rentals for tools and equipment, cost of housing and boarding employees when necessary; **GENERAL EXPENDITURES:** Taxes, assessments, royalties, rentals, insurance of all kinds, including workmen's compensation insurance, bond premium, license, permit and franchise fees, cost of maintaining, enforcing, perfecting, defending and protecting any title, right or interest in any lease or any land included within any lease, or the property used in said operations; including abstractor's and attorney's fees; any sum paid to satisfy, compromise, or settle any claim, demand and actions at law, or in equity, and the cost of prosecuting, defending and adjudicating same; such "general expenditures" except taxes, assessments and insurance of all kinds, shall be charged to the owner of the lease, land or interest thereby involved and deducted from any proceeds accruing to such owner hereunder. **INTEREST:** Interest at the current rate on the average balance for each month computed monthly for all monies advanced or invested by or otherwise becoming due to second party hereunder, for which second party is entitled to be reimbursed. **OVERHEAD EXPENDITURES:** A fixed charge of Six per cent (6%) of the total amount of all expenditures and outlays made for all purposes hereunder during each calendar month.

exist, which they do not, this record fails to show that Shell took any action to its prejudice in embarking on the program under the Fidelity Operating Agreement.

Even if moneys expended by Shell were expenditures and not mere advances, there is no showing they are tied in in any way with the lands of the appellees. The Court found the expenditure of approximately \$12,000,000 by Shell under the Fidelity Operating Agreement, (Finding XXI) (Tr. 195). Defendants' Exhibit 60 shows that of this \$12,000,000, \$11,914,676 was spent for drilling wells, all far distant of the lands of the appellants, and most of them development wells.

The witness Barnes did testify as to expenses for seismic work, estimated at \$725,000 on the Anticline prior to the filing of the suit, but he does not say that any of it was on appellants' lands or even in Unit 5. If money had been spent on the lands of the appellants, or in Unit 5, it must be assumed able counsel would have developed that fact. Certainly the burden of proof was upon the appellees.

As will be pointed out below because of the knowledge possessed by Shell of appellants' claim, that element of lack of knowledge is lacking from the proof of reliance.

Since reliance by Shell is not proven, there can be no estoppel. *Gerard v. Sanner*, 110 Mont. 71, 80, 103 Pac. (2d) 314; 31 C. J. S. 256.

DID SHELL AFFIRMATIVELY PROVE THAT IT HAD NO KNOWLEDGE OF THE CLAIM OF THE APPELLANTS THAT THE FIDELITY OPERATING AGREEMENTS HAD TERMINATED? DID SHELL AFFIRMATIVELY PROVE THAT THE MEANS OF KNOWLEDGE OF THE EXISTENCE OF THESE CLAIMS WERE NOT AT HAND? DID SHELL PROVE AFFIRMATIVELY THAT IT DILIGENTLY SOUGHT TO LEARN WHETHER SUCH CLAIM EXISTED?

In addition to proof of reliance upon false representation or concealment of the facts made by appellants, there must be proof that Shell was without knowledge or means of knowledge of the claim of the appellants that the Fidelity Operating Agreements were no longer effective. *Gypsy Oil Company v. Marsh, Oklahoma* 248 Pac. 329, 48 A. L. R. 876, 886, *supra*.

As a part of this basic element of estoppel, there must be proof also by Shell that it used reasonable diligence to learn the truth, this being especially true where, as here, Shell was put on inquiry to determine the truth. *Thorpe v. Lemire*, 264 Wis. 220, 58 N. W. (2d) 641, 44 A. L. R. (2d) 189, 195. This rule of the Thorpe case being stated in 31 C. J. S. 270, as follows:

"One relying on an estoppel must have exercised such reasonable diligence to acquire knowledge of the real facts as the circumstances of the case require. If he conducts himself with a careless indifference to the means of information reasonably at hand or ignores highly suspicious circumstances, which should warn him of danger or loss, he cannot invoke the doctrine of estoppel." (Emphasis supplied).

A particularly pertinent observation was made by the Montana Supreme Court in the case of *Waddell v. School District No. 2*, 74 Mont. 91, 96, 238 Pac. 884, *supra*:

"A duty rested upon the school trustees in dealing with the landowner to ascertain the true condition of the title of the land before erecting the school building thereon * * *."

There is in this record much evidence that Shell had actual knowledge of the claim of these appellants before it made its agreement with Fidelity and Montana-Dakota, and that at the least it had that knowledge within a very short time thereafter. The testimony of the witness Wight that a notice of cancellaion (Plaintiffs' Ex. 15) was sent by plaintiff Susan Wight some time in 1950 was not contradicted. (Tr. 283).

The witness Wight testified that a land agent of Shell, one Gadbois called on him regarding the lands here involved, and that he, Wight, offered these lands to Gadbois for lease to Shell. (Tr. 275, 276, 196, 297, 304). Wight was not definite as to the exact time Gadbois first called on him, but it was in 1951, or early 1952. There is no question but that the conversation between Wight and Gadbois took place at least several months prior to July 1, 1952. (Tr. 306). The evidence indicates that the first Gadbois visit was probably before the Shell-Fidelity-Montana Dakota Utilities Agreement was made. (Defendants' Ex. 5). Gadbois was not called as a witness by the appellees. No claim was made of surprise or that Gadbois was un-

available. Since the burden is on the appellees to establish the estoppel, the inference is that if the witness Gadbois had been called, he would have corroborated the testimony of the witness Wight, and Gadbois' testimony would have established that at the time Shell was negotiating with Fidelity and Montana-Dakota Utilities, or at least before it incurred any substantial expenditure in the drilling of wells anywhere on the Anticline, it knew that appellants claimed that the Fidelity Agreement was no longer in effect.

The general rule as to the inference to be drawn by reason of the afilure of Shell to call its agent, Gadbois, is stated in *McCormick on Evidence*, 534:

"It is generally agreed that when a potential witness is available and appears to have special information relative to the case, so that his testimony would not merely be cumulative, and where his relationship with one of the parties is such that the witness would ordinarily be expected to favor him, then if such party does not produce his testimony the inference arises that it would have been unfavorable."

See also 31 *C. J. S.* 853:

The testimony of the witness Wight stands uncontradicted. It clearly establishes that Shell knew, long prior to the institution of this suit on February 2, 1953, of the claim of these appellants. This testimony refutes any suggestion of concealment on the part of the appellants of the fact of the existence of their claim, with the intent to lull Shell into a belief that the Fidelity Operating Agree-

ments were considered to be valid and binding by these appellants, as will be set out more fully later.

There is no doubt that the appellees knew directly that the appellant H. C. Smith was claiming that the Fidelity Operating Agreement had expired insofar as his lands were concerned when they received his letter of July 16, 1951, (Plaintiffs' Ex. 50) that letter being dated eight days after the commencement of the first well by Shell some 20 miles north of the lands in question. (Defendants' Ex. 60). It is difficult to reconcile on the one hand the conclusion of the Court that silence estopped the appellants from asserting the invalidity of the Fidelity Agreement, and at the same time, ruling against Smith who did speak out on the theory that his assertion that the agreement no longer was in effect, was a recognition on his part that the Fidelity Operating Agreement was effective, but be that as it may, by that letter, appellees had actual knowledge that at least Smith claimed the agreement was no longer in force. This letter of Smith's was offered by the appellants, including Shell. It knew of it at the time it was received. The Court overlooked completely the notice sent by appellant Cedar Creek on September 12, 1952. (Plaintiffs' Exhibit 21). (Tr. 420, 433). This letter was direct notice of Cedar Creek's claim.

The testimony of the witness Wight as to his conversations with Gadbois, and the letters of H. C. Smith and Cedar Creek, cannot be disregarded, but if they could be, still the appellees would have failed to discharge their

obligation to ascertain the facts. Here we have an oil lease made in 1934, 17 years before the execution of the Shell-Fidelity-MDU Agreement. The lease is not producing. The testimony of the witness Barnes shows clearly that Shell had full knowledge of the date of the drilling of the three wells in 1937. It knew, as it established by its testimony of the drilling of the Carter well which was completed in January of 1942. It knew of the drilling of the Husky well, completed in May of 1950. It knew this was the extent of any drilling purporting to have been done under the Fidelity Operating Agreement.

The Fidelity Operating Agreements (Defendant Ex. 2) were made a part of Shell's Agreement with Montana-Dakota Utilities and Fidelity. (Defendants' Ex. 5). In its Finding No. XIV, (Tr. 192) the Trial Court found the Fidelity Operating Agreements, (Defendants' Ex. 2) to be option agreements. In its memorandum, the Trial Court discussed at length Paragraph IV (the option clause) of the Fidelity Agreement, (Tr. 171, 172, 173, 174), and concluded that:

"Paragraph IV is not ambiguous, needs no explanation by way of oral evidence, and that such evidence is properly excluded."

And further that:

"The meaning of paragraph IV is clear when read in the light of the provisions of the contract as a whole."

The Court is emphatic in its conclusion that the Fidelity Operating Agreements were only options to conduct further drilling, and unless that drilling was carried out, in accordance with the agreements, the agreements expired by their own terms. Shell's attorneys were put on notice immediately after they read the Fidelity Operating Agreement (Defendants' Ex. 2) that it was a mere option which expired without any action by appellants if the option were not exercised.

Shell, as is the case of the whole industry, has as its Bible, Summers Oil and Gas. It knew, as is said in that excellent work in Volume 2 at page 497, that in an unless lease, "failure of a lessee to drill or pay . . . ipso facto, terminates the lease without the necessity of re-entry, action or other equivalents by the lessor."

See also, as a leading Montana case on the point, *Bowes v. Republic Oil Company*, 78 Mont. 134, 143, 252 Pac. 800, where it is said:

"It falls, then, within the category of the 'unless' form of lease, which terminates ipso facto on failure to exercise the option granted and under which no affirmative action is required of the lessor. It is therefore immaterial that the lessor took no action to declare a forfeiture before bringing his action, as the lease automatically expired long prior to the commencement of the action. (*Solberg v. Sunburst Oil & Gas Co.*, 76 Mont. 254, 246 Pac. 168)."

Shell knew that no notice by appellants, nor action to cancel was necessary to terminate the lease if there was not an exercise of the option. 2 *Summers Oil and Gas*, 501.

It must be presumed that Shell Oil Company, one of the largest exploration, drilling and producing companies in the world, would also be familiar with the general rule as stated in *Williard, et al v. Campbell, et al*, 91 Mont. 493, 504, 11 Pac. (2d) 782 (*supra*):

“That time is of the essence of the contract so far as an oil and gas lease is concerned, even though it be not so stated therein, and that a forfeiture is favored where the lessee has failed to begin operations within the time required by the lease.”

This is the universal rule in every jurisdiction.

Here we have an appellee with unequalled experience in the field of leasing and contracting lands for oil exploration, with a large, competent, highly trained staff of attorneys; it had the Fidelity Operating Agreement before it when it made its deal with Fidelity and MDU; the language of the Fidelity Operating Agreement put Shell on notice to inquire into the status of the agreement; it knew that no wells had been drilled under the agreement on the lands of these plaintiffs after 1937; it knew that no wells had been drilled within 25 miles of these lands by Montana-Dakota Utilities or Fidelity, or anyone on their behalf after 1937. Without regard to whether the Trial Court was correct in its conclusion that the evidence was not sufficient to show whether there had been drilling within the requirement of good field practice, (Conclusion of Law No. II) (Tr. 200), the circumstances as to drilling certainly would put any person who knew anything at all about the law of oil and gas on inquiry.

What is said in 31 C. J. S. 270 is controlling:

“One relying on an estoppel must have exercised such reasonable diligence to acquire knowledge of the real facts as the circumstances of the case require. *If he conducts himself with a careless indifference to means of information reasonably at hand, or ignores highly suspicious circumstances which should warn him of danger or loss*, he cannot invoke the doctrine of estoppel.” (Emphasis supplied).

The appellants were available. A simple inquiry would have sufficed to apprise Shell of the existence of their claim that the agreements had expired. Its failure to make the inquiry leads to the conclusion that it did not rely on the continued validity of the Fidelity Operating Agreements when it entered into its enterprise, or that it knew had the inquiry been made that plaintiffs would have asserted their claim that the Fidelity Operating Agreements had expired. The second indispensable element of estoppel, lack of knowledge or of means of knowledge of the fact, and diligence in seeking to acquire knowledge is completely absent from the record. Thus, defendants have failed to establish the second required element of an estoppel.

DID THE CONDUCT OF THE APPELLANTS, AFTER RECEIPT OF THE LETTER OF APRIL 27, 1951, IN WHICH MONTANA-DAKOTA UTILITIES INFORMED APPELLANTS OF ITS AGREEMENT WITH MONTANA-DAKOTA UTILITIES SHOW A DELIBERATE INTENTION ON THE PART OF THE APPELLANTS THAT

SHELL SHOULD ACT UPON THE BELIEF THAT SO FAR AS THE APPELLANTS WERE CONCERNED, THE FIDELITY OPERATING AGREEMENTS WERE IN EFFECT AND THAT SUCH CONDUCT WAS FOR THE PURPOSE OF INDUCING SHELL TO ENTER INTO ITS DRILLING PROGRAM ON THE CEDAR CREEK ANTI-CLINE?

While it is true that mere silence under certain circumstances is sufficient to establish the requisite deliberate intent to influence the conduct of another to act to the other's prejudice, in this record there is proof uncontradicted, negating any such intention on the part of these appellants. We call the Court's attention again to the testimony as to the conversation between Wight and Gadbois, (Tr. 275, 276, 296, 297, 304), and the letters of H. C. Smith of July 16, 1951, (Tr. 179) and Cedar Creek on September 12, 1952 (Plaintiffs' Ex. 21).

In view of the record, there could be no finding of a deliberate intention on the part of these appellants by their silence to induce Shell to initiate a drilling and exploration program. If that were their purpose, Wight certainly would not have told Gadbois Wight could lease the lands and Smith and Cedar Creek would obviously not have written the letters. Under *Section 93-1301-6, R. C. M., 1947* and all the authorities, appellees had the burden of proving appellants set out intentionally and deliberately to deceive the appellees. This burden was not and could not be discharged.

WHAT WOULD HAVE BEEN THE EFFECT OF A CLAIM BY APPELLANTS THAT THE FIDELITY OPERATING AGREEMENTS HAD TERMINATED IF MADE IMMEDIATELY UPON RECEIPT OF THE LETTER OF APRIL 27, 1951?

At the time of the letter of April 27, 1951, the Shell-Fidelity-MDU Agreement (Defendants' Ex. 5) was an accomplished fact. Shell had assumed obligations from which it could not have released itself no matter what action appellants took. The conduct upon which the estoppel was based happened after, not before, the Shell-Fidelity-MDU Agreement was executed. There is no showing in the record by the appellees, who bore the burden of proof, that immediate formal notice by appellants of their claims upon receipt of the letter of April 27, 1951, would have resulted in any change by Shell in its conduct of its exploration and drilling program. Could anyone suppose Shell's program would have ground to a halt if appellants, on receipt of the letter of April 27, 1951, (Plaintiffs' Ex. 26) had written Shell of their claim that the Fidelity Agreements had terminated? Could Shell, in view of its commitments under its agreement with Fidelity and Montana-Dakota Utilities have changed its program in any way had it received formal notice of a claim in May of 1951? The questions answer themselves.

As has been pointed out at the time of the trial, no wells had been drilled on appellants' lands nor within 12 miles of them. There was no activity anywhere, even in the

vicinity of Unit 5, at the time of the trial. What could appellants have done by notice or suit? What duty was there on appellants to do anything until Shell sought to trespass on their lands?

What is said by the Montana Court in a situation analogous to the present one would seem controlling. In *Bowes v. Republic Oil Company*, 78 Mont. 134, 252 Pac. 800, the lessee held several leases on a geologic structure. The lease on appellants' lands—an "unless" lease—had expired by failure of the lessee to drill. Lessee drilled under other leases in the immediate vicinity of lessors' lands and lessee claimed waiver and estoppel by reason of lessor's silence.

Because of the aptness of the language and its striking application to the facts here, we set the applicable portion of the opinion out in full:

"Defendant contends, however, that plaintiff waived the forfeiture by his conduct in permitting the defendant to drill a second and third test well on the structure after the first default, and at great expense to the lessee, he having full knowledge of what was being done. As to knowledge on the part of the plaintiff, there is a substantial conflict in the evidence, as above noted, and if this question were determinative, we would not disturb the court's implied finding against the contention of the defendant. However, it must be remembered that none of the operations of the lessee or its successors were conducted upon the lands of the plaintiff. How, then, could plaintiff have

prevented the lessee from proceeding had he desired to do so? Without passing upon the contention of plaintiff that the defendant is seeking to invoke an estoppel, not pleaded, rather than the waiver pleaded, there was no obligation resting upon the plaintiff to object to operations not upon his land, and his failure to do so constituted neither a waiver of the forfeiture nor an estoppel to assert it. (Solberg v. Sunburst Oil & Gas Co., 76 Mont. 254, 246 Pac. 168)."

The appellees have failed to prove reliance, lack of knowledge of the facts or of means of securing the knowledge by reasonable diligence, and intent of appellants to lull appellees into a belief the Fidelity Operating Agreements were still alive.

The appellees have failed to prove any single one of the essential elements of estoppel, much less the existence of all of the essential elements of an estoppel. Having failed to prove the existence of all of the usual elements, no estoppel arises.

We submit Findings of Fact numbered XXI, XIII, XV, XVI, XVII and conclusions numbered V, VII, VIII and IX are clearly erroneous under Rule 52, Federal Rules of Procedure.

III

THERE WAS NO WAIVER BY APPELLANTS OF THE RIGHT TO CLAIM THE FIDELITY OPERATING AGREEMENTS HAD TERMINATED.

By Specification of Error No II, appellants urge the Court erred in making its Conclusion of Law No. VI, that conclusion being:

"Plaintiffs, and each of them, have waived any right to obtain a judgment and decree of this court canceling or forfeiting the Fidelity Operating Agreements to which they have conveyed their respective interests."

There are no findings of fact specifically relating directly to this point, nor is there any discussion of waiver in the memorandum. It must be assumed that the Court, in reaching its Conclusion No. VI founded the conclusion upon the same findings of fact upon which it founded its conclusion of estoppel. We will not repeat in this section of the brief a discussion of those findings as they are covered by the discussion of estoppel, and that discussion has equal application so far as the findings of fact are concerned to the conclusion there was waiver.

As will be pointed out in the authorities, a greater burden is placed upon one claiming waiver than upon one claiming an estoppel. The fact of waiver must be established clearly and convincingly, and there must be strong proof of the existence of an intent on the part of the one waiving to relinquish a known right.

The leading Montana case on waiver is *Swords v. Occident Elevator Co.*, 72 Mont. 189, 195, 232 Pac. 189, where it is said:

"A waiver is the intentional relinquishment of a known right. *Murray v. Heinze*, 17 Mont. 353, 42 Pac. 1057, 27 R. C. L. 904, 8 Words & Phrases, First series, 73, 75 (* * *)." (Emphasis supplied).

The general rule is stated in 31 C. J. S. 461 as follows:

"The intention to waive the right or advantage in question *must be shown clearly and convincingly*. The best evidence of intention is to be found in the language used by the parties. *When the only proof of intention rests in what a party does or forbears to do, his acts or omission to act which were relied on should be so manifestly consistent with, and indicitive of an intent voluntarily to relinquish a then known particular right or benefit that no other reasonable explanation of his conduct is possible * * ** To establish waiver, it has been stated that the evidence must indicate a meeting of the minds as well as the intentional forbearance to enforce the right in question." (Emphasis supplied).

A further rule is that where there is no agreement in support of a waiver, there must be an element of estoppel. The rule is stated in *Gerard v. Sanner, et al*, 110 Mont. 71, 79, 103 Pac. (2d) 314, *supra*:

"It is well settled that in the absence of acts constituting estoppel, there must be consideration for waiver. 'A waiver, to be operative, must be supported by an agreement founded on a valuable consideration, or the act relied on as a waiver must be such as to estop the party from insisting on performance'. (Citing cases)."

Further, the Montana Court said in the Gerard case:

"Waiver must be manifested in some unequivocal manner and to operate as such it must, in all cases, be intentional. There can be no waiver unless so intended by one party and so understood by the other."

Again it is said that there can be no conjecture in determining the existence of the waiver, the rule being stated in 31 C.J.S. 282:

"A waiver must be manifest in some unequivocal manner, it will not be implied or deemed to exist except where there has been some absolute, positive and unequivocal action or inaction in consistent with the right in question."

A reading of these general rules is alone sufficient to show how far short appellees have fallen in producing proof that would support Conclusion of Law No. VI.

The basic element of proof of waiver is intent to relinquish a known right. The action of the witness Wight, who was representing the appellants generally in the handling of these lands, in offering them for lease to Gadbois (Tr. 275, 276, 296, 297, 304, 306) completely refutes any intent on his part to relinquish the claim that the Fidelity Operating Agreements had expired. The record is uncontradicted that Susan Wight, sometime in 1950, sent a notice to appellees, Fidelity Gas and Montana-Dakota Utilities that the Fidelity Operating Agreement had expired. Reference has been made to the letters sent by H. C. Smith (Plaintiffs' Ex. 30) and the notice of Cedar Creek (Plaintiffs' Ex. 21) (Tr. 420, 433) show affirmatively there was no intention to relinquish.

As has already been pointed out, there was no estoppel to support a finding of waiver.

There being no proof of intention to waive the claim the Fidelity Operating Agreement had expired and there being

no estoppel the Court was clearly in error in reaching its Conclusion of Law No. VI.

IV

APPELLANTS WERE NOT GUILTY OF LACHES

It was error for the Trial Court to hold that the appellants were guilty of laches. Specification of Error No. 10.

By Conclusion of Law No. IV, the Trial Court found the appellants, and each of them, guilty of laches, the conclusion reading:

"Plaintiffs, and each of them, are guilty of laches and barred from obtaining a judgment and decree of this Court cancelling or forfeiting the Fidelity Operating Agreements to which they have committed their respective interests."

Again we point out that this is not an action to cancel or forfeit, but one to quiet title.

No special finding of fact in support of the conclusion is made, nor is there any mention made of laches in the memorandum of the Trial Court. Whether the general findings are sufficient, if supported, to meet the requirements of Rule 52 is doubtful. Rule 52(a) provides:

"... the Court shall find the facts specially . . ."

In view of the comments of the Court in its memorandum, (Tr. 178) which makes it clear that the judgment is based entirely on the finding of estoppel, it would seem the general findings were not intended by the Court to be special findings on the question of laches. Certainly the emphasis on the matter of estoppel must leave this Court

in doubt as to the Trial Court's reasons for concluding that appellants were guilty of estoppel.

Obviously there could be no laches on the part of the appellants prior to receipt of the letter of April 27, 1951, when appellants were first apprised that Fidelity Gas and Montana-Dakota Utilities, or either of them, claimed the Fidelity Agreements to be valid and subsisting agreements affecting the lands of the appellants. As was pointed out in the section of the argument on estoppel, and as will be pointed out later in this brief, the Court correctly held the Fidelity Operating Agreements to be options which ipso facto terminated upon the failure of the lessee to exercise the option. 2 *Summers Oil and Gas* 497, 501.

Appellants had no reason for taking any affirmative action, at least prior to receipt of the letter of April 27, 1951. (Plaintiffs' Ex. 26). The delay then upon which the findings of laches would have to be based would be from no earlier than April 27, 1951, the date of this letter, and February 2, 1953. Under the decision in *Bowes v. Republic Oil Co., supra*, it would seem that a lapse of time in filing the suit would not be significant if it did not have its inception after appellees had moved in on appellants' lands. Under that decision there would be no duty to act until trespass upon appellants' lands.

While it is true that where an equitable remedy is sought, the Court may refuse its aid, although the period which has elapsed without suit is less than that prescribed

by the statute of limitations, the rule is as stated by this Court in *City of Roswell v. Mountain States Telephone & Telegraph Company*, 78 Fed. (2d) 379:

"A court of equity is not bound by a statute of limitations, but in the absence of extraordinary circumstances it usually grants or withholds relief in analogy to it."

The author in 10 Cal. Jur. 525, put it this way:

"Where a statute of limitations applicable at law furnished an analogy by which courts of equity could be guided, they generally followed it in applying the doctrine of laches though they were not bound to do so."

The rule is stated in 30 C. J. S. 557:

"Where there is a corresponding legal right or remedy, although equity may have exclusive jurisdiction over the enforcement of the right, courts of equity ordinarily will apply the statute of limitations by analogy, and it has been held that where the suit has been based on a legal instead of an equitable ground, defendant is entitled to the benefit of the legal limitations statute. In such cases, the equity court is not strictly bound by the statute and although it will generally consider the time fixed thereby as having some bearing on the question of laches, it may consider the circumstances and apply its own rules with respect to laches; while laches will generally follow the law of limitations and relief, ordinarily it will be denied if the suit is brought after the expiration of the statutory period, yet relief may be granted after that time if special circumstances exist which would make the refusal of relief inequitable * * *."

The Montana Statute of Limitations, in effect at the time of this action was brought, was *Section 93-2504, R. C. M., 1947*, reading:

"No action for the recovery of real property or for the possession thereof can be maintained unless it appears that the plaintiff, his ancestor, predecessor or grantor was seized or possessed with the property in question within 10 years before the commencement of the action * * *."

Here if there was any delay of which the Court can take cognizance, that delay would be from April 27, 1951, to February 2, 1953, a total of 21 months. This would be less than 1/6th the period of the Statute of Limitations, and would fall far short of the standard as to delay suggested by the Court in the *Cit yof Boswell v. Mountain States Telephone and Telegraph Company, supra*.

The one essential of laches is long delay in the assertion of the right. It is for that reason that Courts sitting in equity apply the applicable statute of limitations in measuring the lapse of time required to support a finding of laches except in the most unusual cases. The delay of 21 months does not make their claim stale within the authorities.

Laches is a sort of estoppel and closely comparable to an estoppel, the rule being stated in *19 Am. Jur. Pru. 334*:

"The situation which is contemplated by the maxim (equity aids the vigilant) is that which is created where the individual having knowledge of the right which he may assert has failed to act, with the result

that another has acted upon the assumption that such rights do not exist, or will not be asserted. The doctrine of estoppel as applied to this situation is in practical view, the equivalent of the maxim in question."

What is said in part 1 of the argument in this brief as to estoppel has application. The elements of estoppel not being present, it would not seem that laches could be found in any event.

The Court was clearly in error in concluding that appellants were guilty of laches.

V

THE FIDELITY OPERATING AGREEMENTS EXPIRED BY THEIR OWN TERMS

While the Court correctly held that the Fidelity Operating Agreement was an option, Finding of Fact No. XIV, (Tr. 192) it erred in not finding that the option had not been exercised by the Fidelity Gas Company and that therefore the Fidelity Operating Agreements had expired many years prior to the commencement of this litigation. (Specification of Error No. 12).

Because of its importance to this section of the argument, we set out here in full Finding No. XIV:

"Under the terms of said Fidelity Operating Agreements Fidelity Gas Company was bound to commence drilling of a test well somewhere on the Anticline within one year after the execution of certain operating agreements. In the event said test well failed to encounter commercial production, Fidelity Gas

Company, under said Fidelity Operating Agreements had the option to drill additional test wells within the time required by good oil field practice in a wildcat area. There is no evidence in the record as to what constitutes good oil field practice in a wildcat area as regards the time between the completion of an unsuccessful well and the commencement of a new well. In the event oil of commercial quality and in paying quantities was encountered in the first or any subsequent test well drilled under the Fidelity Operating Agreement on the Cedar Creek Anticline, Fidelity Gas Company was required to commence drilling of an additional well or wells within one year from the completion of the first commercial well, and so on, with the purpose of progressively extending the production limits of said Anticline toward and upon the lands covered by each Fidelity Operating Agreement.”

Appellants contend that by the terms of the Fidelity Operating Agreements themselves, drilling of the Carter well in 1941 and of the Husky well in 1949 is not the drilling contemplated to constitute an effective exercise of the option contained in Section 4 of the Fidelity Operating Agreements. For the convenience of the Court, Section 4 is again set out in full:

“4. After completion or abandonment of said well, second party shall have the right, at its option, to prosecute such further drilling of wells under like terms and conditions, and at such times as shall be deemed by it to be good oil field practice, having due regard that the drilling operations hereunder are purely exploratory and speculative, and also having

due regard to weather and road conditions. In the event that under customary oil field practice in prospecting a wild cat area, second party shall be unable to commence the drilling of a new test well before September first of any years, the commencement of any such well may be deferred, at the option of second party, until the following first day of April."

The Court held that a determination of the time in which the option could be exercised depended upon what is good oil field practice in a wild cat area, and that there was not evidence sufficient on that point to enable the Court to arrive at a decision on the point. (Tr. 175, 176). In its memorandum opinion, the Court expressed the view that the delay in drilling the Carter and Husky wells seemed, in the language of the Court:

"... to be a rather long time without any drilling being done * * *."

Appellants believe that there is no need for recourse to expert testimony as to what constitutes good oil field practice, to determine whether or not the option had been exercised. It seems to us a time is expressed in Section 4. That expression, we admit, could have been stated in happier words, that would have left no doubt, but we believe the time is sufficiently stated so as to rule out any possibility that the drilling of the Carter well, commencing in 1941, and the drilling of the Husky well, commencing in 1949, are within the time contemplated by the agreement.

Section 4 says the time in which the option may be exercised shall be that deemed by Fidelity to be "... good

oil field practice." This language does not stand alone. It is modified in the same sentence to the effect that "... due regard to its drilling operations hereunder are purely exploratory and speculative," shall be had, and also "... due regard," shall be taken of "... weather and road conditions."

In the next sentence of Section 4, that time for the exercise of the option, is further indicated as being "... customary oil field practice in prospecting a wild cat area," and the weather and road conditions that are to be considered are nailed down.

The good oil field practice and customary practices mentioned in the paragraph seem clearly to relate to weather, season and roads. The references to weather, season and roads indicate that the parties contemplated Fidelity Gas would be justified in delay in commencing new wells if weather, season and the roads would make it difficult to operate. It is also apparent that the parties took into account the fact that in a wildcat area, roads and improvements would not be in existence. If it were contemplated that drilling could be delayed more than a year, reference to weather and road conditions would seem superfluous. Under paragraph 3 of the agreement, Fidelity is required to commence drilling operations within one year from the date of the execution of the Operating Agreement in the area where the first well was to be drilled. We think that provision is significant in trying to arrive at the intention of the parties, as expressed in Section 4.

Certainly nothing in paragraph 4 suggests that drilling can be delayed from 1937 to 1941 and from 1941 to 1949.

The conduct of appellee, Fidelity Gas, in its operations in 1936 and 1937, indicates its construction of the option. Pursuant to paragraph 3 of the agreement, the first well was commenced in August, 1935, in Unit 8-A. (Plaintiffs' Ex. 2 (Tr. 542)). This well, the NP No. 1, was completed in October, 1936. (Tr. 543). The next well, the Warren in Unit 5, was commenced in the same month that the NP No. 1 was completed, and the third well a few days later. (Tr. 544). Paragraph 4 of the Fidelity Operating Agreement would not require such speed, but obviously it was good field practice in the view of appellee, Fidelity to start immediately on new drilling, or it would not have moved so promptly. The least that can be said of its actions in 1935 and 1936 is that a claim that delays of three and a half years between the completion of the Warren and Smith wells in 1937, and the commencement of the Carter well in 1941 (Tr. 552) and that the delay of more than seven years from the completion of the Carter well to the commencement of the Husky well are contemplated by paragraph 4 of the Fidelity Agreement, is not consistent with appellee's own action.

Paragraph 4 must, of course, be read with the balance of the contract. The consideration recited from the Agreement is \$10.00, and other valuable considerations. No provision was made for delay rentals. The other valuable considerations are exploration, drilling, development and

production. The appellees and their predecessors could only profit from the Fidelity Operating Agreements if there was exploration, development and production. Paragraph 4 must be read with that primary consideration in mind, and when it is so read, it is obvious that the drilling of two dry holes 35 miles south of the lands of the appellants in a 15-year period, is not the exploration, drilling and development contemplated by paragraph 4 of the Fidelity Operating Agreements.

If there is doubt as to the time within which the option had to be exercised, the language would have to be construed against appellees.

The Fidelity Operating Agreements were drafted by Fidelity. (Tr. 583). The rule applicable is stated in 12 *Am. Jur. Pru.* 795:

"Doubtful language in contracts should be interpreted most strongly against the party who uses it. A written agreement should, in cases of doubt, be interpreted against the party who has drawn it. * * * It is said that an instrument uncertain as to its terms is to be most strongly construed against the party thereto who causes such uncertainty to exist."

In *E. I. DuPont Denemours & Co. v. Claiborne-Reno Company*, 64 *Fed. (2d)* 225, 89 *A. L. R.* 238, 245, the Court holds:

"The language of a contract will be construed most strongly against the party preparing it (Citing cases)."

In the *American Law Institutes Restatement of the Law of Contracts*, Section 236, the text says:

"(d) Where words or other manifestations of intention bear more than one reasonable meaning, an interpretation is preferred which operates more strongly against the party from whom they proceed * * * (Citing cases)."

The reason for the rule is stated in 17 C. J. S. 751:

"* * * the reason for the rule being that a man is responsible for ambiguities in his own expressions and has no right to induce another to contract with him on the supposition that his words mean one thing, while it hopes the Court will adopt a construction by which they would mean another thing more to his advantage, * * *."

There is testimony that the language of the contract was discussed and that some changes were made, but there is no testimony that there were any changes in paragraph 4, or any of the other provisions of the contract relating to the time for the exercise of the option. (Tr. 583).

There is a further rule that requires a holding in favor of the appellees on the matter of the time for the exercise of the option, and that is that oil and gas leases are always construed against the lessee. That rule also applies to any ordinary option. The foundation of that rule in Montana is the opinion in *Snyder v. Yarbrough*, 43 Mont. 203, 115 Pac. 411. See also *Brown v. Wilson*, 58 Okla. 392, 160 Pac. 94; *Flank Oil Company v. Belleview Gas & Oil Company*, 29 Okla. 719, 119 Pac. 260.

In *Solberg v. Sunburst Oil & Gas Company*, 76 Mont. 254, 283, 246 Pac. 168, after holding the lease there in question to be a mere option, the Court says:

"It is merely an optional contract, and in conformity with the trend of modern authority generally, and for the reasons above stated, have heretofore held that in such a contract, time is of the essence of the contract where its terms do not so provide, and *that the provisions of such lease are to be liberally construed in favor of the lessor.* (Citing cases).

In *McDaniel v. Hager-Stevenson Oil Co.*, 75 Mont. 356, 366, 243 Pac. 582, the rule is stated thus:

"When a contract is optional in respect to one party, it is to be construed strictly in favor of the party that is bound and against the one who is not bound (Citing cases). Not only that, but it is a recognized doctrine in this court that oil and gas leases are to be construed liberally in favor of the lessor and strictly against the lessee."

Under the Fidelity Operating Agreements, the only ones bound were the lessors. Fidelity was perfectly free to either exercise its option or do nothing, as is true of any ordinary option. Under the authorities cited, the Fidelity Operating Agreements should be construed, if there is ambiguity as to the time element, in favor of the appellants.

Still another rule exists which would seem to require this Court to determine that appellees had not exercised the option upon the record which is before it, and which is complete, is that forfeiture and termination of oil and

gas leases are to be favored. There are numberless cases supporting this statement, and this brief will not be burdened with extensive citations. The rule is briefly stated in *McNamara Realty Company v. Sunburst Oil & Gas Company*, 76 Mont. 332, 352, 240 Pac. 166:

"It must be remembered also that the instrument construed here is an oil and gas lease under which the general rule that forfeitures are looked upon by the law with disfavor gives place to the rule that because of their nature, forfeitures under such leases are favored in the law."

In *Abell et al, v. Bishop*, 86 Mont. 478, 497, 284 Pac. 525, the rule and the reasons for it are stated more fully:

"* * * owing to the peculiar product to be produced, and the fact that the purpose of such lease is to have the land explored and tested for oil rather than to yield ground rental, it has been found necessary to guard the rights of the landowners as well as the public by numerous covenants and provisions, some of the most stringent kind, to prevent the lands from being burdened by unexecuted and profitless leases, and the forfeiture for non-development is essential to private and public interest in relation to the use and alienation of property, (1 Thornton's Law of Oil and Gas 596); consequently the general rule that forfeitures are not favored in the law, does not apply to leases for the purpose of having lands explored for oil and gas; rather, in this class of cases, forfeitures are favored (*McNamara Realty Company v. Sunburst Oil and Gas Co.*, 76 Mont. 332, 247 Pac. 166) and such provisions as that under consideration are to be con-

strued liberally in favor of the lessor bound thereby and strictly against the lessee who is not bound. Time is of the essence of the contract, and forfeiture follows immediately on default * * *."

The language of these decisions has direct application to the facts in the present case. Here there was no cash consideration paid, nor is there any provisions for delay or ground rental. The only consideration flowing to the appellants is exploration and development, with consequent payment to the appellants out of production. Here the appellees are seeking to have the Court declare that these lands have been burdened by an unexecuted and profitless lease for 17 years. Under all of the rules of construction and rules applicable to oil and gas leases stated above, the Court was clearly in error when it failed to find that the Fidelity Operating Agreements, insofar as these appellants are concerned, terminated upon the failure to exercise the option promptly after the completion of the three wells drilled during the years 1935, 1936 and 1937.

VI

IF THERE IS AMBIGUITY IN THE MEANING OF PARAGRAPH 4 OF THE FIDELITY OPERATING AGREEMENT, THEN THE COURT ERRED IN EXCLUDING THE TESTIMONY OFFERED AS TO THE CIRCUMSTANCES UNDER WHICH THE PARAGRAPH WAS NEGOTIATED.

Appellants have specified as Error No. 14 the action of the Trial Court in excluding proffered oral testimony as to the circumstances under which paragraph 4 of the Fi-

delity Operating Agreement was negotiated. The witness Wight was asked to detail the circumstances surrounding the discussions of the Fidelity Operating Agreements at the very time they were signed, particularly with reference to paragraph 4. (Tr. 253, 254, 255, 290, 291, 292, 293, 294). The Court sustained objections to the testimony offered.

If the Trial Court is correct in finding that there was ambiguity as to the time the option could be exercised, the rule to be applied is as stated in 2 *Jones on Evidence* 861:

“On the other hand, in order to show what was in the minds of the parties at the time of executing the instrument, parol evidence is admissible where it appears that the language of the writing is ambiguous or susceptible of more than one interpretation, or where an indispensable term or factor can not be ascertained therefrom. One who is aggrieved is entitled to have the court place itself in a position of the parties with the view to ascertain the true meaning of the language of the instrument, and to have the court resort to extrinsic evidence if necessary for that purpose.”

In the leading Montana case of *Ming v. Pratt*, 22 Mont. 262, 36 Pac. 279, the Court ruled:

“As aids to an understanding of a written contract, but not to alter its terms, the surroundings of the parties, the subject matter, and even prior and contemporaneous oral negotiations and promises as illuminating the design and intent, may perhaps be proved; but resort to such evidence is proper only where necessary, and is not permissible where the intention and understanding are explicitly declared upon the face of the writing itself.”

The Court concludes in the following language which has direct application to our case:

"The trial court, over objections, permitted certain witnesses for the plaintiff to testify to offers they had received with respect to drilling on the Pewters' permit prior to the negotiation with defendant corporation * * *. Section 105, 107, R. C. M. of 1921 (now 93-401-13, R. C. M. 1947) after prohibiting the reception of evidence to the terms of a written agreement, other than the writing itself, with certain exceptions, declares that the provisions of the section do "not exclude other evidence of the circumstances under which the agreement was made. Clearly an explanation of the circumstances and *a repetition of the conversation between the parties at the time of making of the contract* fall within the contemplation of this section. (Citing cases). The admission of this testimony is not error." (Emphasis supplied).

The Court's attention is also called to the decision in *Brown v. Homestake Exploration Co.*, 98 Mont. 305, 39 Pac. (2d) 168, where the Montana Court had under consideration an oil and gas lease. The question there under consideration was the number of wells to be drilled under the lease, and the facts were most similar to those in the instant case. The Court held the conversations that took place at the time of the making of the contract concerning the meaning of the ambiguous provision to be admissible. After citing and quoting from decisions to the effect that where the terms of a contract are plain and unambiguous, resort may not be had to extrinsic circumstances under the pretense of ascertaining its meaning, the Court said:

"The contract in question does not come within the foregoing rule. Construction is necessary to determine its meaning as to the number of wells to be drilled."

We conclude by calling the Court's attention to the general statement found in *20 Am. Jur. Pru. 999*:

"Whenever the terms of a contract are susceptible to more than one interpretation, or an ambiguity arises, or the extent and object of the contract cannot be ascertained from the language employed, parol evidence may be introduced to show that it was in the minds of the parties at the time of making the contract that determined the object on which it was designed to operate."

If this Court determines there was ambiguity in the meaning of Section 4 of the Fidelity Operating Agreements, then the Trial Court was clearly in error in excluding the proffered testimony.

VII

IT WAS THE DUTY OF THE APPELLEE, FIDELITY GAS COMPANY TO DILIGENTLY AND WITHIN A REASONABLE TIME, CONTINUE EXPLORATION FOR OIL IN THE DEEPER SANDS.

As a corollary to their position that the Court erred in failing to find that the appellee Fidelity Gas had failed to exercise its option under the Fidelity Agreements, appellants specify as error, the failure of the Court to find that appellees had failed to diligently, and within a reasonable time, continue exploration for oil in the deeper sands. (Specification of Error No. 13).

In every oil and gas lease is an implied covenant that the work of exploration, development and production shall proceed with reasonable diligence for the common benefit of the parties, or that the premises be surrendered to the lessor. In the leading Montana case of *Berthalote v. Loy Oil Company*, 95 Mont. 434, 445, 28 Pac. (2d) 187, the Court held:

"Where, as here, a lease is granted for a nominal and initial consideration, and the lessee agrees to pay in return therefor a share of the oil or gas produced from the land, it is apparent that the principal consideration of the grant, is the promise of the lessee to pay the royalty. The payment of the royalty is, however, contingent upon production. Where the real purpose is thus disclosed, but the lease does not contain in itself express provisions creating duties in the lessee to do such acts as were necessary for the accomplishment of that purpose, the law implies them (Summeters Oil and Gas 391; Merrill on Implied Covenants 18-21; Thornton on Oil and Gas, 5th Ed., Sections 154-157).

"The Courts have implied various covenants in oil and gas leases in furtherance of this purpose as is illustrated by the following cases: *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801, 809, 72, CCA 213, (and other cases)."

After quoting from *Brewster v. Lanyon Zinc Company*, *supra*, the Montana Court said:

"These implied covenants are conditions of the lease under consideration and upon the plain and substantial breach thereof the lease became terminated,

and no longer of any force or effect, although still appearing on the records as an effective disposal of oil and gas under the leased lands.”

In *Brewster v. Lanyon Zinc Company, supra*, an oil gas lease similar in terms to the ordinary “unless” lease was under consideration. After pointing out that the consideration that flows from the lease is production, the Court in the *Brewster* case said:

“The implication necessarily arising from these provisions * * * the work of exploration, development and production should proceed with reasonable diligence for the common benefit of the parties, or the premises be surrendered to the lessor.

“The object of the operations being to obtain a benefit or profit for both lessor and lessee, it seems obvious, in the absence of some stipulation to that effect, that neither is made the arbitrar of the extent to which, or the diligence of which the operation shall proceed, and that both are bound by this standard of what is reasonable.”

In a case in which the facts are strikingly similar to those in question, *Sauder v. Midcontinent Petroleum Company*, 292 U. S. 272, 54 S. Ct. 671, two small wells had been drilled on a portion of the lands involved. On the basis of these two wells that were producers, the lessee attempted to hold all of the lands for a period of 17 years without drilling further wells. Here, on the basis of one dry test well, appellees are trying to hold approximately 4,500 acres for a period of 18 years. The language of the *Sauder* case fits the facts in this case perfectly:

"This definition of the scope of the implied covenant (from the Brewster case) has been generally adopted in the decisions of the federal and state courts. The facts demonstrate that the respondent (lessee) has not complied with its obligations. It has held a half section for 17 years without the drilling of an exploratory well, and claims to be entitled to hold the lease for an indefinite period with no exploration unless some other operator brings in a producing well on adjoining land, or fresh geological data comes to light * * *. The justification for the respondent's position is that the geologic data and the experience upon surrounding lands are both unfavorable to the discovery of oil or gas upon the east half of section 16 (a 320 acre tract) * * *. The production of oil on a small portion of the leased tract cannot justify the lessee's holding of the balance indefinitely and depriving the lessor, not only of the expected royalty from production pursuant to the lease, but of the privilege of making some other arrangement for availing himself of the mineral content of the land."

The breach of this implied covenant alone terminated the Fidelity Operating Agreement. When considered in the light of paragraph 4 of the Fidelity Operating Agreement, there can be no doubt but that the Court erred in failing to hold that the option had not been exercised and the agreement ipso facto terminated. It was clearly error for the Court to fail to find breach of the implied covenant to diligently explore, drill and develop the lands in question.

VII

THE FIDELITY OPERATING AGREEMENTS CLEARLY
TERMINATED BY ABANDONMENT.

Appellants urge that the Trial Court erred in not finding that the Fidelity Operating Agreements were terminated by abandonment. (Specification of Error No. 15). By their pleading, appellants contend that if the Fidelity Operating Agreements were not terminated by failure of Fidelity Gas to exercise the option within time, or if the agreements did not terminate by reason of the breach of the implied covenant to diligently explore, drill and develop, then the agreements terminated by abandonment. The burden is cast upon us by the rule that findings of fact will not be set aside unless clearly erroneous, the rule being as stated in *Rule 52(a), Federal Rules of Civil Procedure*:

“Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge with the credibility of the witnesses.”

The testimony upon which appellants contention of abandonment is bottomed is that relating to certain conversations between the witnesses Wight and Jirik on one hand the witnesses Cecil Smith and R. M. Heskett on the other. There is sharp conflict in the version these witnesses give of the conversations, but we think all of this testimony considered as a whole as to the conversations, together with the actions of the parties, will demonstrate that the Trial Court was clearly in error in making its finding that there was no abandonment. (Finding of

Fact No. XXII) (Tr. 196) Conclusion of Law III (Tr. 200) Memorandum (Tr. 177). In its memorandum, the Trial Court found that the evidence concerning the statements made by officials of appellee Fidelity Gas Company and appellee Montana-Dakota Utilities Company: " . . . was unconvincing."

Appellants earnestly contend that the testimony was convincing, and that it was supported by the conduct of all of the parties. The testimony of the witness Wight, who was handling all of these properties for the appellants for the purpose of renting it for oil and gas and of the witness Jirik, president of Cedar Creek, that they thought from 1938 to 1951 that the agreements had terminated, is clear, convincing and absolutely uncontradicted, and may not be ignored. (Tr. 27, 73, 76, 384, 385, 419, 420, 421). It is also clear that they gained this idea through the conversations with Cecil Smith and Heskett. (Tr. 421, 272). The conduct of Wight and Jirik was consistent with their version of the conversations. From 1938 on, Wight periodically sought to lease the lands for oil exploration. (Tr. 272). Certainly Wight and Jirik thought the conversations were a clear statement of an intention to abandon any rights Fidelity might have had under the Fidelity Operating Agreements and conducted themselves accordingly.

Briefly the conversations upon which Wight and Jirik relied in reaching their conclusion that Fidelity had abandoned its rights under the contract, are as follows:

Wight's first conversation was with Heskett, president of Fidelity and of MDU. The substance of the conversation contained in this testimony of the witness:

"Q. Tell us what that conversation was between you and Mr. Heskett?

A. I went down there to see him if I could get them to go deeper because I thought there was a possibility of encountering oil at a greater depth. He told me definitely at that time they were through drilling for oil, had gotten their hands burned, so to speak, and the stockholders were complaining about spending so much money; they were definitely through drilling for oil, not going to do anymore development as far as oil was concerned; they were going to stick to drilling for gas."

Tr. 264). Further, with relation to the conversation with Heskett, Wight testified:

"He told me, as I stated a minute ago, definitely they were through drilling for oil, but I was free to do whatever I wanted to do; if I had some proposition whereby they could get the well drilled deeper, they would be willing to listen to it, but as far as they were concerned, they were definitely through with any more oil wells."

Tr. 265).

Heskett's testimony consisted of a categorical denial that he had made the statements attributed to him by Wight. (Tr. 626). On cross-examination, after pointing out that he and Wight were not friendly, Heskett stated that he didn't recall that Wight had been in his office at all during

the years 1935, 1936, 1937 and 1938. (Tr. 627). Wight testified that he had been in Heskett's home at the same, which Heskett denied. (Tr. 628).

The witness Jirik testified that he had a visit also with Mr. Heskett in Mr. Heskett's private office sometime late in 1937. (Tr. 415). His testimony is that:

"Mr. Heskett told me that they got a dry hole, and that they spent too much money. They were criticized by the stockholders and they were all through drilling for deep oil in the Baker field."

(Tr. 416). Again Heskett, on his testimony, denied categorically the making of the statement attributed to him by Jirik. (Tr. 626). Heskett did recall that Jirik called in to see him occasionally, and may have been in during 1937. (Tr. 627).

Wight also talked to Cecil Smith within a year after the abandonment of the Warren well, which occurred in January of 1937, and his testimony is that:

"Cecil Smith told me definitely they were through with any further exploratory work for oil; * * *." (Tr. 270).

Referring to Heskett, Smith and other officials of Montana-Dakota Utilities Company and Fidelity Gas Company, Wight testified:

". . . they told me firmly and definitely they were through with drilling and further exploratory oil wells, and as far as I was concerned, I was free to do what I wanted to with the oil rights."

(Tr. 270).

At the same time, Jirik had his conversation with Heskett, he talked to Cecil Smith. When asked what his discussion was with Smith, Jirik replied:

"I said: 'Mr. Heskett just informed me you folks were not going to do any more in the Baker field'. He said: 'We are not. We are all through'."

In a later visit in 1938, in the company of Mr. Seivers with Cecil Smith, Jirik stated the discussion as follows:

"Mr. Seivers was disappointed and asked Mr. Smith, he said he understood they had given up drilling any deep wells, and Cecil Smith said, 'We absolutely have, we are not spending any more money, and we have given up drilling, deep drilling in the Baker field'."

As was the case with Heskett, Smith categorically denied the statements attributed to him by Wight. (Tr. 567). He denied there had even been a discussion of the deepening of the Warren well. Smith claimed on his original testimony, that Wight had not even been in his office during the years 1937 and 1938 because of litigation pending between Wight and Montana-Dakota Utilities, and that the feeling between the two was unfriendly. (Tr. 568, 582, 620, 621, 622). On cross-examination, Smith was forced to confess that during the period when he said that Wight was not in his office and not likely to be there, he was carrying on detailed discussions and correspondence with Wight regarding another gas field, and a letter couched in friendly and personal terms dated December 14, 1938,

from Smith to Wight was introduced as Exhibit 53. (Tr. 623). The letter established that Wight had been in the office a few days previous to the date of the letter. (Tr. 623). The painful attempt of Smith to extricate himself from his prior testimony casts very real doubt on the truth of any of it. (Tr. 624). Plaintiffs' Exhibit 54 (Tr. 629, 630) shows conclusively that Smith's attempt to show that Wight's relationship with him were such that Wight would not be in his office anytime during 1937 and 1938, to be either fabrications or the results of an extremely faulty memory. In either event, his testimony denying his statements to Wight becomes of little value.

Smith also categorically denied the statements attributed to him by Jirik. (Tr. 632).

Recognizing again the right of the Trial Court to pass upon the credibility of the witnesses based upon the appearance of the witness on the stand, nothing about the appearance of the witness Cecil Smith could possibly overcome the effect of the change in his story as to Wight's visits to his office, and as to the relationship that existed between himself and Wight during the years 1937 and 1938, and we submit that the record shows the Trial Court was clearly in error in accepting Smith's version of the conversations with Wight and Jirik. The most that can be said of Heskett's testimony is that he did not recall the conversations.

But there are circumstances here in the conduct of appellees Fidelity Gas and Montana-Dakota Utilities that cor-

roborate the version of the conversations given by Wight and Jirik. As has been pointed out, the purpose of the Fidelity Operating Agreements was to secure exploration, drilling and development of the lands included in the agreements on the Cedar Creek Anticline. The drilling that occurred in 1935, 1936, 1937 carried out the purpose and object of the agreements. The witness Cecil Smith admitted on the stand that in 1938:

"We had quit our drilling program, * * *."

In other words, Fidelity did just exactly what Smith denied he told Wight and Jirik he was going to do. Jirik said Cecil Smith told him that Fidelity had:

"... given up drilling any deep wells," and that "we are not spending any more money and we have given up drilling, deep drilling, in the Baker field." (Tr. 418).

Again Jirik says Smith told him that Fidelity was not going to do any more drilling in the Baker field, and that Fidelity was all through. (Tr. 416).

Wight testified that Heskett told him that Fidelity was definitely through drilling for oil. (Tr. 264). Smith told him that Fidelity was definitely through drilling for oil, but that Wight was free to do whatever he wanted to. (Tr. 265). The statements attributed to Heskett and Smith exactly state what happened. From the time of the statements of Smith and Heskett in 1937 and 1938, neither Montana-Dakota Utilities nor Fidelity spent a cent in the way of testing, drilling, seismic work or otherwise

under the Fidelity Gas Contract. (Tr. 607). At the time of the conversations, all drilling activities on behalf of Fidelity or Montana-Dakota Utilities had ceased. Those activities ended with the completion of the Warren and Smith wells as dry holes in 1937, though there was some testing on the Smith well into 1938. (Tr. 544, 545). There was no actual drilling after 1937. (Tr. 544, 545).

The actions and conduct of Smith and Heskett as officers of the appellee corporations, are completely inconsistent with their denial of the truth of their conversations as reported by Wight and Jirik and makes their testimony as to the conversations completely incredible and leaves the testimony of Wight and Jirik, in effect, uncontradicted. The truth of the testimony of Wight and Jirik is corroborated by the statement of Cecil Smith that Fidelity had quit its drilling program, and by the action of Fidelity in terminating entirely in 1937 its drilling program.

The Trial Court's determination that there was no abandonment is based on its view that appellants failed to establish an intent on the part of Fidelity to abandon its rights under the Fidelity Agreements. Memorandum (Tr. 177). If the testimony of Wight and Jirik as to the conversations with Cecil Smith and Heskett is believed, the intention to abandon is clearly established. There are many definitions of abandonment. 1 C. J. S. 5, defines abandonment as:

" . . . the intentional relinquishment of a known right; the relinquishment of a right by the owner

thereof without any regard to the future possession by himself or any other person, and with the intention to forsake or desert the right; etc.”

Under paragraph 4 of the Fidelity Operating Agreements, Fidelity had a right by drilling additional wells to keep the Fidelity Operating Agreement alive. When Fidelity, through its officers Smith and Heskett, in Smith's own words “quit their drilling program” they abandoned their right to keep the Fidelity Operating Agreements alive by drilling. The only way the agreements could be kept alive was by drilling under paragraph 4. When they quit the drilling program, and announced they were quitting it, they were intentionally relinquishing, on behalf of appellee Fidelity, the right to keep the agreements alive. Then and there, their rights under the Fidelity Agreements were relinquished. By their statements and their conduct they established the intention to forsake or desert the right to keep the Operating Agreements alive. 1 C. J. S. 5. The abandonment was expressed and it was voluntary within the requirements of the rules. 1 C. J. S. 9. Once abandonment takes place, the title or ownership of the property abandoned divests forthwith, 1 C. J. S. 18. Anything Fidelity did by way of vague actions to include the lands of the appellants in negotiations with other oil companies at a later date, could not serve to revest it with title.

Abandonment is more readily found in this case of oil and gas leases than in ordinary cases. A case similar on the facts to the instant case is *Hall v. Augur*, 256 Pac. 232, 82 Cal. App. 594:

"Abandonment will be more readily found in the case of oil and gas leases than in most other cases. In *Harris v. Riggs*, 63 Ind. App. 201, 121 N. E. 36, it is said: 'Such a lease may be abandoned, and when once abandoned by the lessee, cannot thereafter claim or enforce any right thereunder without first securing the consent of the lessor or a renewal of time. (Citing cases).'

"It has been held and supported by sound reason that abandonment may be more readily found in cases of oil and gas leases than in most other instances. The rights granted under such leases are for exploration and development. The title or interest granted is inchoate until oil or gas is found in quantities warranting operations, and courts will not permit the lessee to fail to develop the lease for speculative or other purposes except in strict compliance with this contract for a valuable and sufficient consideration other than such developments. (Citing cases)."

There is testimony on behalf of the appellees that in negotiations between Fidelity and Carter and Husky the lands involved had been included in a discussion of the lands which might be covered by the agreements with Carter and Husky. (Tr. 51, 612). It will be noted that Smith does not testify that the specific lands of the appellants were included in his reference to the lands in Unit 5. It is undisputed that from 1938 to 1951 appellees, neither by word nor act, indicated to appellants that appellees were still claiming under the Fidelity Operating Agreements. In *3 Summers Oil and Gas*, page 26, the author states:

"The lessee's intention to abandon is not his secret intention to hold the property for speculative purposes, but his legal intention is determined by his conduct."

The conduct that determines the controlling intent, i. e., the legal intent, are the statements of Smith and Heskett, the cessation of the drilling operations by Fidelity, and the silence of Fidelity and its officers. The secret intent to try to hold appellants' properties under the terminated agreement is not sufficient to establish the intent not to abandon.

Abandonment of the purpose of an agreement or lease is abandonment of the agreement or lease itself, as stated in *Burton, et al v. Coss, et al*, 280 Pac. 1093, 139 Okla. 42, the Court there saying:

"The question of abandonment is to be determined by the facts and circumstances surrounding each particular case. The intent to abandon by the lessee is to be determined by his attitude toward the enterprise as a whole. He might intend to hold the land itself without any intention or proceeding to test the premises and develop the same for oil and gas. *If he abandons the purpose of the lease, he will be held to have abandoned the land which was granted as an incident to the enterprise.* Mills on Oil and Gas, 166)." (Emphasis supplied).

If the Fidelity Operating Agreements did not expire by their own terms, then any rights appelles had under the agreements were abandoned, and the determination by the Trial Court that there was no abandonment is clearly erroneous.

VIII

APPELLEES ARE ESTOPPED FROM CLAIMING THE FIDELITY OPERATING AGREEMENTS WERE STILL IN EFFECT.

The Court erred in not holding that appellees were estopped from claiming the Fidelity Agreements were subsisting agreements as to the appellants. (Specification of Error No. 16).

By the reply, appellants pleaded that appellees were estopped from claiming any right in the lands described in the complaint. (Tr. 104, 105). The facts will not be restated in this section of the brief, nor will there be long discussion of the general principles applicable to estoppel. The acts of the appellees upon which the claim of an estoppel is founded by appellants are that from the making of the Fidelity Operating Agreements through 1937, appellee Fidelity Gas Company engaged in a very active, extensive drilling program with frequent reports to appellants. In 1937 and 1938, through statements of Cecil Smith and Heskett, appellants were given to understand that appellee Fidelity Gas had given up any claim to any rights under the Fidelity Operating Agreements. All drilling was terminated. From 1938 to 1951, appellees gave no indication that they were claiming any rights under the Fidelity Operating Agreements. Relying on the conduct and the silence of appellees, appellants took no affirmative steps to quiet the title to these lands.

All of the essential elements of estoppel are present as those elements are specified in *Waddell v. School District No. 2*, 74 Mont. 91, 96, 238 Pac. 884, *supra*, the requisite elements being that:

- "1. The party to be estoppel must be possessed of knowledge of the true facts or conditions;
2. He must intend that his statements or conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe that he so intended;
3. The party on the other side must be ignorant as to the true state of facts; and
4. Must rely upon the representation made or conduct of the party to be estopped."

To paraphrase this quoted language, 1, appellees knew of the statements of Smith and Heskett and of the cessation of drilling; 2, Fidelity intended that the statements of Smith and Heskett and the silence from 1930 on, should be acted upon by appellants, or at the very least, that the actions of appellee were such that appellants had a right to believe that appellee intended that appellants should act upon a belief that appellee intended that the Operating Agreement be terminated; 3, appellants were ignorant of the fact that appellees were claiming the Fidelity Operating Agreements were still effective, and, 4, appellants clearly relied upon the representation made and the silence of appellee, and for that reason, failed to take affirmative steps years ago to quiet their titles to the lands involved.

The contrast between the situations of Fidelity and appellants as to the lapse of time is striking. The Trial Court found non-action for a period of 21 months to be sufficient to estop appellants. In the case of appellees, there was not only silence and non-action from early 1938 to April, 1952, but there were the statements of Cecil Smith and Heskett which, at the very least, were statements of an intention not to do any more drilling under the agreement, followed by the total lack of any activities on seismographing, exploration or drilling within 35 miles of the lands of the appellants for some 18 years.

We respectfully submit that the record requires a finding of estoppel as against the appellees and that the Court's failure to make such a finding was clearly erroneous.

CONCLUSION

Appellants respectfully submit: (1) They are not estopped to question the validity of the Fidelity Operating Agreements as they apply to appellants' lands; (2) The appellants have not waived the right to urge that the Fidelity Operating Agreements have terminated; (3) The appellants are not guilty of laches in asserting their claims; (4) Appellees failed to exercise the option by drilling further wells in accordance with the terms of the Fidelity Operating Agreements, and as a result, the agreements terminated ipso facto; (5) If the Fidelity Operating Agreements did not terminate ipso facto by failure of appellees to exercise the option, they terminated by breach of the implied

covenant to diligently drill and develop; (6) If the Fidelity Operating Agreements did not terminate otherwise, they terminated by abandonment; (7) The appellees are estopped from claiming the Fidelity Operating Agreements were still in effect.

The judgment of the Trial Court should be reversed with directions to enter a judgment for the appellants quieting the titles to their lands and leases insofar as they relate to the deeper sands.

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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

CEDAR CREEK OIL AND GAS COMPANY,
a corporation;
INTERNATIONAL TRUST COMPANY, a corporation;
H. C. SMITH; SUSAN M. WIGHT; and W. B. HANEY,
Appellants,

vs.

FIDELITY GAS COMPANY, a corporation;
MONTANA-DAKOTA UTILITIES COMPANY,
a corporation;
and SHELL OIL COMPANY, a corporation,
Appellees.

BRIEF OF APPELLEES

Appeal from the United States District Court for
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Billings Division

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NO. 15293

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

CEDAR CREEK OIL AND GAS COMPANY,

a corporation;

INTERNATIONAL TRUST COMPANY, a corporation;

H. C. SMITH; SUSAN M. WIGHT; and W. B. HANEY,

Appellants,

vs.

FIDELITY GAS COMPANY, a corporation;

MONTANA-DAKOTA UTILITIES COMPANY,

a corporation;

and SHELL OIL COMPANY, a corporation,

Appellees.

BRIEF OF APPELLEES

Appeal from the United States District Court for
the District of Montana
Billings Division

JURISDICTION

On October 15, 1956, appellees moved to dismiss this appeal on the ground that the notice of appeal was filed too late. The motion was denied. (238 F. 2d 299) This Court's attention was not invited to the then unreported *F & M Schaefer Brewing Co. v. United States*, 236 F. 2d 889 (2d Cir., Sept. 12, 1956) involving circumstances closely parallel to those present in the instant case. The Supreme Court has granted certiorari in the *Schaefer* case and it has been placed on the summary calendar. If *Schaefer* is affirmed, this Court might wish to reconsider its jurisdiction.

Deeming appellants' statement of the case inadequate and in some instances inaccurate, appellees present the following:

STATEMENT OF CASE

Pleadings

a. Amended Complaint.

(Tr. 14-55)

The amended complaint consists of twelve causes of action. Each is to quiet title to lands or leases in Fallon County and the allegations are generally the same. Each appellant alleges two causes of action and in one reference is made to the basis of appellees' claim as being:

"That the defendants claim some right against the lands and leases of the plaintiff, Cedar Creek Oil and Gas Company, a corporation, described above, under and by reason of a lease and operating agreement bearing date of the 7th day of February, 1935," (Par. VII, First Cause of Action. Tr. 17)

The agreements are identical with Exhibit 2 in evidence, except as to names, descriptions and dates. It is sometimes spoken of as the "Deep Test Agreement" because it pertains to operations below the depth of 2,000 feet. In the answer appellees designate it as "Fidelity Operating Agreement."

The other cause of action for each appellant is different only in referring to another document, the Gas Unit Agreement. This is generally referred to as the "Gas Unit Agreement". It is identical with Exhibit 3 in evidence, except as to names, lands and dates and primarily pertains to production of gas from shallow sands.

The statement that "Appellants are the owners of certain lands and leases" on page 2 of their brief is inaccurate. Each appellant claims solely under federal or fee oil and gas leases, and they are not landowners. (Tr. 130-138)

Although the causes of action are in form to quiet title, it is apparent that appellants were seeking cancellation of the Fidelity Operating Agreement and the Gas Unit Agreement insofar as it provides for unitization of formations below the Judith Sands.

b. Answer.
(Tr. 58-98)

The first defense is that the complaint fails to state a claim on which relief can be granted. For a second defense, the appellees answered jointly denying that appellants were in possession of the lands and leases; alleging that appellees are in possession; and specifically setting forth the agreements under which they claim either as parties thereto or successors in interest. It is further alleged that the agreements are in full force and effect. In the answer to each cause of action the agreements are specifically described. (See the answer to the first cause of action for typical allegations. Tr. 58-59).

In addition to the Fidelity Operating Agreement and Gas Unit Agreement previously referred to, the Gas Purchase Agreement (Exhibit 4) and Shell Operating Agreement (Exhibit 5) are set forth. Under the Gas Purchase Agreements, Gas Development Company, predecessor of Montana-Dakota Utilities Company, agreed to buy and appellants agreed to sell natural gas from the lands involved herein. The Shell Operating Agreement invested Shell with the operating rights of Montana-Dakota Utilities Co. and Fidelity Gas Co. in all formations below a depth of 2,000 feet. Fidelity Gas Co. is a fully owned subsidiary of Montana-Dakota Utilities Co.

The third defense is estoppel, the fourth waiver and the fifth laches. (Tr. 60-62)

c. **Reply.**
(Tr. 101-112)

The reply is directed to the agreements referred to in the answer, and generally alleges that the Fidelity Operating Agreements expired under their terms because of failure to drill more wells; if not so terminated they were abandoned; and if not abandoned they terminated because of failure to continue exploration. Estoppel of appellees is alleged in paragraph IV. (Tr. 104-105)

The reply contains certain allegations with reference to the invalidity of the Gas Unit Agreements and Gas Purchase Agreements, which are omitted because at the pre-trial conference it was stipulated that all question as to the validity of these agreements was eliminated; and appellants' contention was limited to the claim that they apply only to the Judith River Sands. (Tr. 116)

At the opening of the trial the third and fourth causes of action pertaining to Mondakota Gas Company, were dismissed on motion of appellants' counsel. (Tr. 231)

STATEMENT OF FACTS

The lands involved are within an area known as the Cedar Creek Anticline in eastern Montana. Maps showing the Cedar Creek Anticline were introduced by stipulation at the pre-trial conference as Exhibits 1 and 1-A. (Tr. 118, 230) These exhibits consist of the official U. S. Geological Survey map, in two parts, with gas units, well locations and other data shown thereon. The lands involved here are in the area designated Unit 5, and are indicated on Exhibit 1 in red shading. They constitute only a part of the land within Unit 5. The other owners and lessees who became parties to the Fidelity Operating Agreement and the Gas Unit Agreement are not before this court. The appel-

lants' lessors, including the United States, are not parties.

Montana-Dakota Utilities or its predecessors were producing gas from the Cedar Creek Anticline at the time the gas purchase agreements, gas unit agreement and Fidelity Operating Agreements, referred to in the answer, were executed. (Tr. 521) Much of the land was government owned and the appellants or their predecessors were being pressed by the government for payment of compensatory royalties, since they were not marketing gas and it was alleged that drainage was taking place. (Tr. 242, 243, 524) To relieve this situation, and with the guidance and help of the United States Geological Survey, a meeting was arranged between most of the appellants, or their predecessors, to discuss the terms of the three types of agreements pleaded in the answer, which were intended to provide for a comprehensive development of the lands within the Cedar Creek Anticline and assure a market for gas. (Tr. 526) The meeting resulted in Montana-Dakota purchasing gas under purchase agreements, development and operation for gas production under gas unit agreements and the exploration for oil and gas below 2,000 feet under the Fidelity Operating Agreements. (Tr. 247, 538)

The memorandum report of this meeting, prepared by H. J. Duncan, supervisor of United States Geological Survey, is in evidence as Exhibit 49. It shows that in addition to four representatives of U.S.G.S., John Wight and George Norbeck, Attorney F. G. Huntington (Wight's attorney), R. M. Heskett, Cecil W. Smith and Attorney Raymond Hildebrand were present. As shown by the report accord was generally reached on the form of gas unit agreements, gas purchase agreements and the "operating agreement designed to provide for the cooperative prospecting and development of oil and gas below 2,000 feet in Cedar Creek Anticline, Montana . . .". The taking of

gas prior to commencement of operations under the Gas Unit Agreement was agreed upon in order to provide "for the payment of monies past due and owing to the United States for compensatory royalty or rentals" (Par. 6, Ex. 49) owing by Wight and his group. (Tr. 538)

Unit 5 is one of several units within the Cedar Creek Anticline. (Tr. 537; Ex. 1) All were formed with approval of the United States, acting through the Secretary of the Interior. (Tr. 536) The easterly and westerly boundaries were dictated by the U.S.G.S., but the lines between units were based largely on the wishes of the interested owners of operating rights. (Tr. 535-538) While some units now cover the deep horizons, Unit 5 Gas Unit Agreement refers primarily to the gas production above 2,000 feet, but commits all parties to unitization of deeper horizons. (Ex. 3, Tr. 538)

In connection with the gas purchases the gas unit agreements were made. (Tr. 247) Through the gas units Montana-Dakota Utilities Co. carried on extensive development for the production of gas in Unit 5 and other units in the Cedar Creek Anticline. (Tr. 521, 523) Under them operations are still being carried on. The lessors under the leases involved, of which the United States is the principal one, are not seeking cancellation. They are not parties to this action.

Recognizing the possibility for development of gas and oil at lower horizons and as part of an over-all development the Fidelity Operating Agreements were entered into with the appellants (Tr. 538, Ex. 2) and others covering about 90% of the lands in the Cedar Creek Anticline. (Tr. 539)

With the Fidelity Operating Agreements executed Fidelity made extensive geological examinations of Cedar Creek Anticline. Geologist Frank W. DeWolf, one-time dean of the Geology Department of the University of Illinois, undertook a

study of the Cedar Creek Anticline. (Tr. 478-480) After completing his work and with the aid of seismographic mapping, which was done on his recommendation, he concluded that the Cedar Creek Anticline was "essentially one structure". (Tr. 485) "It was one structure leading up to a major closed dome at the south end, the so-called—what is it, Little Beaver". (Tr. 486) Based upon these findings N. P. No. 1 was drilled by Fidelity, followed by the Warren and Smith No. 1 Wells. (Tr. 487-491)

Fidelity commenced a test well, N. P. No. 1, in August 1935, and completed it in October 1936. (Tr. 542) Small but non-commercial production was encountered. (Tr. 546-547) Immediately the Warren well was commenced in Unit 5 and completed in January 1937. (Tr. 544) Smith's No. 1 was also commenced in October 1936. (Tr. 544) Much work was done in an attempt to produce these wells commercially during 1938, but without success. (Tr. 546-547) Approximately \$450,000 was expended by Fidelity on drilling and geophysical work. (Tr. 542, 543, 545, 547)

During the period 1935 to January 1939 negotiations were carried on between The California Company and officers of Fidelity looking to development of the Cedar Creek Anticline, including Unit 5, under Fidelity Operating Agreements. (Tr. 506-511, 547-551; Ex. 41 and 42) The California Company also did geophysical work on portions of the Anticline. (Tr. 511-512) Finally, California decided not to go ahead with development and on January 9, 1939, so advised Fidelity. (Tr. 512; Ex. 42)

Fidelity entered into two agreements with The Carter Oil Company (Ex. 43 and 44). Exhibit 43 is dated June 6, 1940, and relates to Unit 8. Under the agreement Carter agreed to commence a seismic survey during the summer of 1940 and

within 60 days after its completion either to relinquish the area or drill a well. If it chose to drill, Fidelity agreed to assign and sublease to Carter its rights under the Fidelity Operating Agreement (Ex. 2) and Carter agreed to assume Fidelity's obligations under the operating agreement, and agreed to pay to the lessees and permittees the 25% of the net proceeds provided in the operating agreements.

Exhibit 44 is dated November 27, 1940, and relates to Units 1 to 7, inclusive. Under this agreement Carter acquired the right to extend its operations into these units pursuant to the provisions of the Fidelity Operating Agreement (Ex. 2). If it elected on or before January 1, 1942, to drill a well in one of the units Fidelity agreed to assign and sublease to Carter its rights under the Fidelity Operating Agreement and Carter agreed to pay to the lessees and permittees the 25% of the net proceeds as provided in said Operating Agreement. Under these agreements Carter commenced a well in May 1941 in Unit 8 which was completed in January 1942 as a noncommercial well. (Tr. 552, 554)

By telegram dated December 31, 1941, Carter notified Fidelity that it had decided not to drill on Units 1 to 7, inclusive. (Ex. 45)

Fidelity entered into an agreement with Husky Refining Company (Ex. 46) on November 20, 1948, applicable to Units 8A and 8B. Under its agreement (Ex. 46) Husky drilled a well in Unit 8B which was completed in July, 1949, as a nonproductive well. (Tr. 559-562) It cost \$165,964.32. (Tr. 562)

By letter dated November 13, 1948, (Ex. 47) Fidelity agreed with Husky that if it deemed it advisable to negotiate for the development of deeper horizons in Units 1 to 7, inclusive, it would advise Husky of the terms upon which it would begin negotiations. Husky would then have a period of 30 days within

which to accept or reject such terms. This agreement was terminated on May 31, 1950. (Ex. 48)

Early 1950 negotiations began between Shell and Fidelity which resulted in the agreement of April 10, 1951. (Tr. 562; Ex. 5) Shell had expended about \$725,000 in geophysical work on the Anticline during 1950, 1951, and 1952, and \$600,000 in 1953 and 1954, (Tr. 680-681), including work on the portion of the Anticline lying in Gas Unit 5 (Tr. 664). Under it over fifty-three wells had been drilled at the time of the trial. (Ex. 60) The locations of forty-two are shown on Exhibit 1. Oil has been discovered and is being produced in the north and south ends of the Cedar Creek Anticline and drilling and production are progressing toward Unit 5. (Exhibits 1 and 60) The expenditures for drilling, equipping, producing and operating wells to March 31, 1955, were approximately \$12,000,000.00. (Ex. 60)

The Williston Basin Area came to life, so to speak, through a succession of oil discoveries; Amerada near Williston, N. D., in May, 1951; Shell at Richey, July, 1951; Shell on the Pine Unit in north Cedar Creek Anticline in January, 1952; and Shell again in Little Beaver in south Cedar Creek Anticline in July, 1952. (Tr. 643) These last two wells were drilled under the Shell-Fidelity Operating Agreement. (Exhibits 1 and 5)

These successful developments caused a great speculative boom to envelop eastern Montana. (Tr. 645-649) Thomas A. Jirik, president of appellant Cedar Creek Oil and Gas Company, when asked if the drilling of the well by Shell in Little Beaver, a part of Cedar Creek Anticline, created any new interest, replied: "I am happy to tell you it is just a completely different picture with the Shell people doing what they are doing." (Tr. 431) Then followed this question and answer:

"Q. It puts an entirely different complexion on the

whole Cedar Creek Anticline, doesn't it?

A. Absolutely." (Tr. 431-432)

Values of the interests appellants had committed to the agreements suddenly spiralled. Prior to Shell discoveries in the Pine and Little Beaver wells leases had a value of about \$2.50 per acre and subsequently they went to \$430.00 or an average of between \$300.00 and \$500.00 per acre. (Tr. 650-654)

Although Wight, Jirik and Seivers testified they had conversations in 1937 and 1938 with Cecil W. Smith and R. M. Heskett in which they were told Fidelity was through with deep tests in Cedar Creek, (Tr. 263-267, 415-419, 452-454), (departing substantially from their prior testimony on that subject in depositions taken in 1953), no request for a release to clear the records was ever made. (Tr. 572)

In 1949 Wight prepared and sent to each of the appellants a form of notice which, in turn, was to be sent to appellees Fidelity and Montana-Dakota, advising that the Fidelity Agreements were no longer valid. (Ex. 21, Tr. 332) The record does not reflect that any of the appellants sent this notice except Cedar Creek, and then not until September 12, 1952, after three producing wells were completed, others were being drilled, and heavy expenditures had been made by Shell. (Ex. 60)

On April 27, 1951, Fidelity and Montana-Dakota by letter advised all of the appellants of the April 10, 1951 operating agreement with Shell and Shell's proposed operations under the Fidelity Agreements. (Ex. 26, Tr. 374)

The only other notice sent to Fidelity or Montana-Dakota was a letter dated July 16, 1951, from appellant H. C. Smith declaring forfeited and cancelled any interests under the old operating agreements. There is no evidence of any such notice from any of the appellants to appellee Shell Oil Company. (Ex. 30)

No notice of forfeiture was ever given to Fidelity. (Tr. 572)

ARGUMENT

Appellants first argue the question of estoppel, laches and waiver. It was upon such findings the lower court primarily rested its decision. The appellees are of the view that an understanding of the provisions, purposes and meaning of the Fidelity Operating Agreement and performance thereunder is of primary importance in considering all questions presented, including estoppel, laches and waiver. The points to be discussed by appellees may be summarized as follows:

1. Review of the Fidelity Operating Agreement with reference to its provisions, purposes, meaning and performance thereunder.
2. The trial court's conclusions that appellants' claims are barred by the defenses of laches, estoppel and waiver are supported by the facts and the law.
 - a. The trial court's findings of fact relating to laches, estoppel and waiver are amply supported by the evidence.
 - b. Established principles of law support the court's conclusions of law sustaining these defenses.
3. Under the provisions of paragraphs 4 and 6 of the Fidelity Operating Agreement, appellees were permitted to exercise their discretion as to the extent of further drilling, provided they acted in good faith.
 - a. Appellants were required to plead and prove Fidelity's lack of good faith in exercising its discretion with reference to further exploratory drilling.
 - b. Covenants will not be implied where the standard

of development is expressly covered in the agreement.

4. Appellants were required to give notice of appellees' default, under express or implied duty to drill or develop.
5. The Fidelity Operating Agreements have not, as claimed by appellants, expired under their own terms.
6. The court's finding and conclusion that appellees have not abandoned their rights under the Fidelity Agreement are strongly supported by the evidence.
7. Paragraph 4 of the Fidelity Operating Agreement is not ambiguous and parol evidence concerning its provisions was properly excluded.
8. Appellees are not estopped from claiming under Fidelity Operating Agreements.

1.

Fidelity Operating Agreement

a. Provisions.

It is the type of operating agreement frequently found especially in "wildcat" oil and gas areas. Persons, like these appellants, who have working interests as lessees or operating rights under lessees get together with a development program. They are usually referred to as "non-operators". Next they find an operator, who will undertake drilling a test well at his sole expense for an interest in the profits out of production. He also agrees to keep the leases alive by payment of rentals or development. In some instances the operator puts up all the costs of developing, producing and equipping wells to be repaid out of production, if any. The non-operators take no risk, but share in a percentage of profits, as was the case here. A common

basis is 75% to the operator and 25% to the non-operators. The operator, being the only one required to put up money, is ordinarily given wide discretion in the development program. As will be shown, this agreement follows the usual pattern.

The Fidelity Operating Agreement provides in part:

The rights of non-operators in specified lands under leases, permits and agreements are committed to the operating agreement. Then it is agreed:

1. Non-operators represent that they own or control as "lessees, permittees or operators" interests of $87\frac{1}{2}\%$ of all oil and gas. (Ex. 2, Par. 1)
2. Operator agrees to perform the obligations imposed on non-operators under the various leases, permits and agreements. It may after notice surrender or quitclaim the lease, permit or agreement to the non-operator owner. (Par. 2) Near the end is a forfeiture clause which will be considered later.
3. Operator agrees: To "conduct a geological examination of Cedar Creek Anticline, . . . for the purpose of determining a location deemed favorable for drilling a well to test said structure for oil and/or gas."

In the same paragraph the time for commencement of drilling was set at one year after certain agreements were executed on specified lands. The test well was to be located on lands within the "structure"—Cedar Creek Anticline. Its depth and other conditions were specified.

4. If the first test well proved noncommercial Fidelity was given the right to "prosecute further drilling . . . at such times as shall be deemed by it to be good oil field practice, having due regard that the drilling operations hereunder are purely exploratory and speculative." (Par. 4)
5. If oil was discovered in the test well in commercial

quantities, outside a specified area, Fidelity agreed to commence a second test well within Units 2, 3, 4, or 5, to test a horizon where production was found in the first test. (Par. 5) If the second test proved commercially productive, Fidelity was obligated to continue drilling new wells in the productive area "for the purpose of progressively extending the producing limits, toward and upon" the lands subject to the particular contract. (Par. 5)

6. It was also provided that Fidelity "shall be free to exercise its sole discretion and judgment in" performing terms of leases, permits and agreements and in developing, drilling, operating and producing oil from the land. (Par. 6)

Then follow provisions governing costs of operations, division of profits, sale of oil, unitization and many other details not immediately important.

b. Purpose.

The Fidelity Operating Agreements, the Gas Unit Agreement and Gas Purchase Agreement were brought into being as "triplets", so to speak, at the Billings meeting with U.S.G.S. officials during May, 1934. The interested parties were faced with these problems: (a) Wight and others who held interests under government leases needed a market for gas in order to pay rentals, compensatory royalties and hold their rights. This immediate problem and a future market for gas was taken care of through the gas purchase agreements. (b) Excessive drilling was avoided and good conservation practices were assured by the Gas Unit Agreement. Also, under it, the burden of initial drilling and operating costs was shifted from Wight, Norbeck and appellants or their predecessors to the operator. (c) Finally, it was desirable for all concerned to have as much land as possible

within Cedar Creek Anticline, blocked up for development of gas and oil if any were found at lower horizons. This was desirable in making the area attractive to those able to risk capital on expensive development, as pointed out in the testimony of witnesses Davies (Tr. 512) and Barnes (Tr. 682). This was accomplished through the Fidelity Operating Agreement.

c. Meaning.

The deep rights were committed to the Fidelity Operating Agreements on about 90% of the lands in Cedar Creek Anticline; not always by the landowner lessors, but by the owners of working interests created by base leases and prospecting permits. Having assured continuation of the leases under the gas units and purchase agreements, they were in position to realize profits through production from deeper horizons, without any expenditure of money by them, under Fidelity Operating Agreements.

The burden of lease and other obligations was transferred to Fidelity. It was also agreed to make geophysical tests of Cedar Creek Anticline to find the most suitable location for a test well. With this done a test well had to be drilled to specified depths at a location anywhere on the structure.

The next consideration to be covered was: "What happened if the test well was a dry hole?" Paragraph 4 gives the answer by providing: "second party shall have the right, at its option, to prosecute such further drilling of wells under like terms and conditions, and at such times as shall be deemed by it good oil field practice, having due regard that the drilling operations hereunder are purely exploratory and speculative." . . . (Par. 4)

Then to cover what must be done if the test well is productive fixed obligations are provided in paragraph 5. If the com-

mercial well is on lands not covered by the specific agreement but within Cedar Creek Anticline, a second well must be commenced on lands in Units 2, 3, 4 or 5, within one year after completion of the commercially productive well. If the second well is commercial Fidelity agrees to "prosecute in accordance with good oil field practice the further drilling of wells in the vicinity of said paying well, or wells, . . . for the purpose of progressively extending the producing limits, toward and upon the lands subject to this agreement."

These provisions are perfectly clear. If commercial production were found in the test well a second test well had to be commenced within a year in a specified area. Even then drilling was not required on lands subject to leases in which appellants were interested; only such drilling as good field practice dictated, progressively extending production toward the lands in the specific agreement if and when there was production.

Naturally, less stringent provisions were to apply where the first test well was a dry hole. Therefore, additional drilling was not required to commence within a year, but "*at such times as shall be deemed by it to be good oil field practice.*" The amount of drilling was also to be governed by good oil field practice taking into consideration that such drilling operations "are purely exploratory and speculative," with due regard to weather and road conditions. (Par. 4) Weather and road conditions in the rugged Cedar Creek area make the purpose of this provision obvious as a protection to an operator in his development program.

d. Performance.

The appellants do not question the fact that the Fidelity Operating Agreements were regularly executed, geophysical work was done, and the test well was drilled as agreed. It follows, without question, that the agreements went into effect

and remain valid and subsisting agreements unless they have been cancelled or voided in some manner.

The following chronological list of drilling and development carried on by, or on behalf of, Fidelity under the Fidelity Operating Agreement summarizes the previous statement of facts for more ready reference:

- | | |
|--------------|---|
| 1935 | N. P. No. 1 commenced. (Tr. 542) |
| 1936 | Smith No. 1 commenced. (Tr. 544) |
| | N. P. No. 1 completed. (Tr. 543) |
| | Warren well commenced. (Tr. 544) |
| 1937 | Smith No. 1 completed. (Tr. 546) |
| | Warren well completed. (Tr. 545) |
| 1938 | Pumping test at Smith well. (Tr. 545) |
| 1939 | Negotiations unexpectedly terminated with The California Company. (Tr. 512) |
| 1940 | Negotiations began with Carter. (Tr. 551) |
| 1941 | Well spudded in May 12, 1941. (Tr. 552) |
| 1942 | Well plugged and abandoned. (Tr. 552) |
| 1941 to 1946 | World War II in progress. Labor and equipment shortage. (Tr. 556-559) |
| 1947 | Negotiations with J. E. Manning and others. (Tr. 559) |
| 1948 | Negotiations with Husky Refining Company. (Tr. 560) |
| 1949 | Contracted with Husky Refining and well commenced. (Tr. 561) Well completed 1949. |
| 1950 | Negotiations began with Shell. (Tr. 562) |
| 1951 | Shell Agreement dated April 10, 1951. (Ex. 5) |

- | | |
|--------------|--|
| 1952 | Shell-Pine Well completed. (Tr. 693, Ex. 60) |
| | Shell Little Beaver No. 1 completed. (Ex. 60) |
| 1952 to 1955 | Continuous drilling of 53 wells by Shell to March 31, 1955. (Ex. 60) (Tr. 693) |
| 1935 to 1955 | Gas being produced and purchased from lands of appellants and Units 1 to 8B inclusive under Gas Unit Agreements and Gas Purchase Agreements. |

There was a continuous effort to explore the deep horizons of Cedar Creek Anticline for oil. This was the primary objective under the Fidelity Operating Agreements. The development of the specific lands in which appellants and other parties had working interests was secondary. The period 1942 to 1947 was the longest period of non-drilling activity. World War II was then in progress and controls resulting therefrom were continued.

In the recent decision of the supreme court, *Fey v. A. A. Oil Corporation*, Mont., 285 P. (2d) 578, 589 (June 1955), forfeiture and cancellation of a lease on 9,000 acres of land, which was part of a structure, was sought. One gas well was drilled on the Fey land from which no gas was marketed. It was contended that the lessee had failed to diligently develop. During a portion of the period World War II was in progress, there was a shortage of labor and materials and no market was available for sale of gas. These comments by the court are applicable here:

“While there was considerable delay in the completion of Fey No. 1 well, and in the subsequent unsuccessful attempts to drill the second well on the Fey lands by the Feys’ refusal to allow defendants entrance to drill, *the further circumstances of the inability of defendants to obtain materials for the drilling was not controverted. During those war years all operators were*

restricted by the government's strict allocation of iron and steel products. The lessees proceeded to develop the properties under all the circumstances with reasonable diligence and in accordance with what a reasonably prudent operator would have done." (Emphasis supplied)

In the face of repeated discouraging results Fidelity continued its development effort until the ultimate purpose of the Fidelity Operating Agreements was accomplished; namely, the discovery and development of oil in the deeper sands of Cedar Creek Anticline.

If the efforts of Fidelity, prior to discovery of oil, were thought inadequate under the agreement an avenue was open to appellants. They could have served notice of default if in fact there was a default and the agreement would have been cancelled, unless the default was remedied within 30 days. (Par. 2) No notice of forfeiture having been given, this exit from the agreement is foreclosed. The difficult and expensive undertaking of oil development from very deep wells in Cedar Creek Anticline was successful under the Fidelity Operating Agreement. If appellants were dissatisfied anywhere along the way, why did they not say so or give notice of default?

At this point it seems appropriate to call attention to the equitable nature of the action. Appellants seek equity, so must they do equity. Was it in equity and good conscience that appellants, on John Wight's advice and with purpose and design, withheld notice of forfeiture after Wight assured them that Fidelity would remedy any default if given the opportunity? (Ex. 20, Tr. 333)

2.

The trial court's conclusions that appellants' claims are barred by the defenses of laches, estoppel and waiver are supported by the facts and the law.

A. The trial court's findings of fact relating to laches, estoppel and waiver are amply supported by the facts.

- (1) The Fidelity Operating Agreements covering 90 percent of acreage in Cedar Creek Anticline within Units 1 to 8B, made development possible.

Fidelity Operating Agreements were obtained on about 90 percent of the acreage on the Cedar Creek Anticline, from Unit 1 to and including Units 8A and 8B. (Tr. 539) The geographical extent of the Cedar Creek Anticline is not questioned by appellants. A two-section map showing this data and the location of Units 1 through 8B is in evidence without objection. (Ex. 1, 1A, Tr. 230) Witness DeWolff classified the Anticline as one geologic structure. (Tr. 490) The Fidelity Operating Agreement under its own terms contemplates cooperative exploration and development on the *entire* Anticline. (Ex. 2, Par. 3, 5) The Carter Oil Company agreements in 1940 (Ex. 43, 44) and the Husky Refining Company agreements in 1948 (Ex. 46, 47) with Fidelity covered operations pursuant to the Fidelity Operating Agreement.

The Shell-Fidelity Operating Agreement of April 10, 1951 (Ex. 5) expressly covers *all* of the Fidelity Operating Agreements, *i.e.* covering about 90% of the acreage on the Anticline. A reading of the opening paragraphs of the Shell agreement reflects that it contemplates operations on the *entire* Anticline. It does not, as grossly misstated by appellants "relate primarily to Units 8A and 8B." (Brief 31)

The foregoing resume reflects that Fidelity, initially, Carter, Husky and Shell all sought, and to a large extent obtained, essential control of Anticline lands before undertaking expensive exploratory operations. The California Company, in its unsuccessful negotiations with Fidelity were "interested in taking over interests on the entire anticline." (Tr. 512) The testimony of appellees' witnesses Davies (Tr. 512) and Barnes (Tr. 682) points out that control of the block of land is a prerequisite to expensive exploration. It is a perversion of Barnes' testimony to hint, as did appellants, that the saving of time is the only consideration. (Brief 30)

**(2) Heavy expenditures under the
Fidelity Operating Agreement.**

The significance of heavy expenditures, particularly when made with knowledge of appellants, will be covered in the discussion applying the equitable defenses to the facts now being outlined.

The development of the deep sands under the Fidelity Operating Agreement has been detailed on pages 17 and 19 herein. The principal expenditures were as follows: early geophysical work costing about \$25,000 (Tr. 542); N. P. No. 1 Well, \$212,251.00; the Warren Well, \$88,063.03; and the Smith, \$125,615.88 (Tr. 543, 545, 547); Husky's well in 1949 cost \$165,964.32 (Tr. 562).

Evidence as to the cost of the Carter well was not admitted. (Tr. 555) However, it was drilled to a depth of 9,100 or 9,200 feet, and it is evident that a considerable sum was expended. (Tr. 552)

Shell spent \$725,000 for seismic and geophysical work on the Anticline in 1950, 1951 and 1952; \$600,000 during 1953 and 1954. (Tr. 681) Appellants assert that the witness Barnes did not say that any of this was spent on appellants' lands or

in Unit 5. (Brief 37) This assertion flies directly in the face of the record. Witness Barnes testified "we . . . then came back up along the anticline with various other lines across the structure, one of which was tied into the Warren well." (Tr. 663) The Warren well was located in Unit 5. (Tr. 489) Specifically, Barnes testified further:

"Q. Did you also run a survey or a line in Unit 5?

A. We did; there have been a number of them in that unit." (Tr. 664)

Shell drilled or commenced eleven wells before the summons was served at a cost of \$1,846,180.00. Thereafter up until March 31, 1955, 42 additional wells cost \$9,335,497.00. There were additional expenditures in the field of \$732,999.00, making in all a total of \$11,914,676.00. (Ex. 60)

**(3) Value of oil and gas interests on
Anticline have been greatly enhanced.**

Again, the fluctuating character of oil and mining properties is one of, if not the most important element to be considered in applying the equitable defenses. The courts have rigorously applied the doctrine of laches, estoppel and waiver in this case, as appellees shall later point out.

Shell discovered oil in the Pine Area of the Cedar Creek Anticline in October 1951 (Tr. 669) and in Little Beaver, at the south end of the Anticline, in July 1952. (Ex. 60) Values of acreage in the Cedar Creek Anticline suddenly spiralled. Prior to Shell's Pine and Little Beaver, drilled pursuant to the Shell-Fidelity Operating Agreement of April 10, 1951, leases had a value of \$2.50 per acre and subsequently went as high as \$430.00 an acre and an average of between \$300.00 and \$500.00 per acre. (Tr. 653) In fact, during 1950 there was considerable Federal acreage on or adjacent to the Anticline

that could be leased for simply the filing fee of 50 cents per acre. (Tr. 645)

As mentioned earlier, even witness Jirik, President of appellant Cedar Creek Oil and Gas Company, testified:

“Q. Has the drilling of the well by Shell in Little Beaver created any new interest?

A. I am happy to tell you it is just a completely new picture with the Shell people doing what they are doing.

Q. It puts an entirely different complexion on the whole Cedar Creek Anticline, doesn't it?

A. Absolutely. (Tr. 431, 432)

.

Q. Now, did you also learn of the Shell discovery in the Pine Unit in the Cedar Creek Anticline in January, 1952?

A. Yes, sir.

Q. And would you also say that helped to put a new complexion on the whole Cedar Creek Anticline possibilities for oil production?

A. Yes, sir, it did.” (Tr. 433)

There is no question about the huge increase in value stemming from Shell's discoveries.

(4) Appellants knew that appellees were continuing to claim under the Fidelity Operating Agreements.

The record is clear, and it was so stipulated that appellees Montana-Dakota Utilities and Fidelity Gas Company advised each appellant by letter dated April 27, 1951 of the Shell-Fidelity Operating Agreement of April 10, 1951. (Ex. 26, Tr. 374) In that notice, each appellant was expressly advised that all lands

on which Fidelity held operating agreements had been committed to the Shell agreement.

Further, the letter said Shell had agreed to commence a deep test well within 90 days.

As a result the district court found that appellants knew "*at least*, from shortly after April 27, 1951" that appellees were claiming under the Fidelity Operating Agreements and that appellee Shell was preparing to spend large sums in reliance upon these agreements. (Finding XXIII, Tr. 196, 197) The words "at least" are significant. There is substantial evidence to warrant a finding that appellants knew in 1949 of Fidelity's continued claim under the Fidelity Operating Agreement and some evidence that they knew much earlier.

We turn first to knowledge in 1949. The testimony of appellants' leading and interested witness, John Wight, is replete with references to him acting in a representative capacity for appellants, naming them several times as "my group". (Tr. 245, 249, 278, 282, 325, 354) He had long and extensive experience in oil and gas dealings in the Cedar Creek Anticline. (Tr. 238-242; 319-321) In 1949 Wight prepared and sent to each of the appellants a form of notice which, in turn, was to be sent to appellees, Fidelity and Montana-Dakota, advising them that the Fidelity Operating Agreements were no longer valid. (Ex. 21, Tr. 332) This precipitated a question to Wight as to whether in 1949 he "thought Fidelity might be claiming some interest under this agreement." He answered: "I knew if there was any chance of Fidelity or Montana-Dakota Utilities thinking they could claim it, they would do it." He continued:

"A. I hadn't heard that they had, but I knew enough about them. I knew they would if they could. I didn't intend to let them claim anything they didn't have

a right to claim. I wanted to close the door before they made a claim.

Q. That was in 1949?

A. I knew them well enough to know they would grab on to anything. As soon as Amerada discovered oil in North Dakota, I knew if there was any chance, they would be in to claim.

Q. Was it 1949 that Amerada discovered oil in North Dakota? I will give you the date of May, 1951. Was that the first discovery made by Amerada in North Dakota?

A. They started drilling in 1949.

Q. So, in 1949, then you thought Fidelity might be claiming some interest under this agreement?

A. As soon as it rather looked like it was becoming valuable, as soon as Amerada was going to drill, I knew if there was any chance of Fidelity or Montana-Dakota Utilities thinking they could claim it, they would do it. I thought I could forestall any claim they might put out. I didn't think they had a legal claim or right. I didn't know what a Court would decide. I thought they were out, defaulted, abandoned it." (Tr. 336)

(It is noteworthy that Fidelity had late in 1948 negotiated the agreements with Husky Refining under which the Husky well was drilled in 1949.) (Ex. 46, 47)

The record also shows, with respect to knowledge on the part of appellant Cedar Creek, that Mr. Jirik, president, discussed the drilling of the Carter and Husky wells frequently with Mr. Cecil Smith of Montana-Dakota and Fidelity, although Jirik denied this as to the Husky well. (Tr. 572, 700)

(5) Steps taken by appellants to assert their claims.

Although this suit was filed in state court in December, 1952, Shell was not joined as a defendant nor were any of the parties served until the amended complaint was filed on February 2, 1953. Therefore appellees take the date of February 2, 1953 as the date upon which appellants instituted action. This is the date found by the district court (Tr. 197) and used by appellants. (Brief 54)

There is no evidence in the record of any written notice to Shell advising of appellants' claims. Appellants gave Fidelity and Montana-Dakota no written notice pertaining to the Fidelity Operating Agreement other than a letter dated September 12, 1952 from Cedar Creek (Ex. 21) and a letter dated July 16, 1951 from H. C. Smith (Ex. 30) declaring forfeited and cancelled any interests under the old operating agreements. The Smith letter was termed by the district court "ineffective as a notice of default" under paragraph 2 of the Fidelity Operating Agreement. (Tr. 180)

Appellants completely disregard the record when they twice say that Susan Wight sent a notice cancelling the Fidelity Operating Agreement. (Brief 30, 52) Exhibit 15 only purports to cancel *paragraph 3 of the Gas Unit Agreement*. It had nothing to do with the Fidelity Operating Agreement.

No notice of default was ever given appellees by any of the appellants. (Tr. 572)

In a final effort to show notice to Shell of appellants' claim, resort is had to some alleged conversations between Wight and a Shell representative or representatives. Appellees find it impossible to determine when or how many times these alleged conversations took place or just who participated. (Tr. 276, 277, 295-297, 300, 301, 304-307, 328, 329) This, in our opinion,

is a classic example of confusion in testimony. It demonstrates a sound basis for the regard given to the opportunity of the trial court to gauge the credibility of the witnesses, under Rule 52(a) of the Rules of Civil Procedure. The trial court, as it had a right to do, disregarded this testimony. It found that appellants "remained silent and made no claim that the Fidelity Operating Agreements had expired . . ." (Finding XXIII, Tr. 197) Presumably this includes Wight acting in their behalf. The trial court affirmatively found that early in 1950 Shell began its negotiations with the other appellees, resulting in the April 10, 1951 operating agreement. (Finding XX)

(6) Proximity of drilling to appellants' leases.

Appellees cannot see how the distance of wells drilled from appellants' leases have any bearing on the equitable defenses. Such references are made in appellants' brief, in an apparent effort to create a special class of Fidelity Operating Agreements as applied to Unit 5. In the same vein they repeatedly refer to "Fidelity Agreements as they applied to appellants' land".

It should be quite apparent from the wells platted on Ex. 1 and 1A and the tabulation of wells drilled (Ex. 60) that Shell is "drilling new wells for the purpose of progressively extending the producing limits, toward and upon" the leases of appellants as required by paragraph 5 of the Fidelity Operating Agreement. Shell's offered testimony regarding its plans for drilling in Unit 5 was rejected. (Tr. 680)

Appellants frequently refer to Shell's drilling as not "within 12 miles of appellants' land"; and "many miles remote" (Brief 15); "far distant" (Brief 37); "nor within 12 miles" (Brief 47). These statements are not supported by the evidence. Exhibits 1 and 1A show Shell-N. P. Well No. 41-4 in the extreme

south of Unit 3 about 6 miles northerly of the appellants' most northerly leases.

B. Established principles of law support the court's conclusions of law sustaining these defenses.

1. LACHES

(1) Application of laches generally.

The question of laches is addressed to the sound discretion of the trial court, and its decision will not be disturbed on appeal unless it is so clearly wrong as to amount to an abuse of discretion.

Gillons v. Shell Co. of California
86 F. 2d 600 (9th Cir. 1936) Cert. denied
302 U.S. 689, 58 S. Ct. 9, 82 L. Ed. 532;

Kimberly Corp. v. Hartley Pen Co.
237 F. 2d 294 (9th Cir. 1956);

Robert Hind, Ltd. v. Silva
75 F. 2d 74 (9th Cir. 1935);

Pacific Royalty Co. v. Williams
227 F. 2d 49 (1955), cert. denied 351 U.S.
951, 100 L. Ed. 1474.

Potash Co. of America v. International Min. & C. Corp., 213
F. 2d 153, 154, (10th Cir. 1954), tersely comments:

"To constitute laches two elements must exist: first, inexcusable delay in instituting suit and second, prejudice resulting to the defendant from such delay."

Hammond v. Hopkins, 143 U. S. 224, 12 S. Ct. 418, 427, 36
L. Ed. 134 (1892), outlined the basis for the well-established principle thus:

"Each case must necessarily be governed by its own circumstances, since, though the lapse of a few years may be sufficient to defeat the action in one case, a longer period may be held requisite in another, dependent upon the situation of the parties, the extent of their knowledge or means of information, great changes in values,"

(2) The doctrine of laches is relentlessly applied in cases involving oil and mining properties.

Appellants have carefully sidestepped any reference to the wealth of decisions concerning the vigorous application of laches to oil and mining properties.

The general rule is well stated as follows:

“A person may not withhold his claim, awaiting the outcome of an enterprise, and then, after a decided turn has taken place in his favor, assert his interest, especially where he has thus avoided the risks of the enterprise. Accordingly, if the property involved is of a speculative or fluctuating character, more than ordinary promptness is required of the claimant; he must press his claim at the earliest possible time. *This rule is applied with great strictness in the case of oil or mining property, since it is of a specially precarious nature, and is exposed to the utmost fluctuations in value.*” (30 C.J.S., Equity, § 118, p. 541) Emphasis supplied)

The landmark case in the field is *Twin-Lick Oil Co. v. Marbury*, 91 U.S. 587, 593, 23 L. Ed. 328 (1875). The defendant Marbury had loaned money to plaintiff corporation, of which he was a director and stockholder. As security for repayment of the loan, he took the corporation's deed of trust covering, among other properties, a producing oil and gas lease. Four years after the foreclosure and defendant's acquisition of title, plaintiff brought the action to impose a constructive trust and have the sale set aside on the ground of fraud. After holding there was no evidence of fraud and the transaction was not void, the court concluding that the plaintiff was guilty of laches, said:

“The fluctuating character and value of this class of property is remarkably illustrated in the history of the production of mineral oil from wells. Property worth thousands today is worth nothing tomorrow; and that which would today sell for a thousand dollars as its fair

value, may, by the natural changes of a week or the energy and courage of desperate enterprise, in the same time be made to yield that much every day. The injustice, therefore, is obvious of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit."

This forceful statement has been quoted many times, among them being:

Johnston v. Standard Min. Co.
148 U.S. 360, 13 S. Ct. 585, 37 L. Ed.
480 (1893);

Haynes v. Silver Prince Min. Co.
86 Mont. 10, 281 Pac. 548 (1929);

Mantle v. Speculator Min. Co.
27 Mont. 473, 71 Pac. 665, 667 (1903);

Medallion Oil Co. v. Hinckley
92 F. 2d 155, (9th Cir. 1937);

Buchler v. Black
226 F. 703, (9th Cir. 1915);

Taylor v. Salt Creek Consol. Oil Co.
285 F. 532, 539, (8th Cir. 1922).

The Supreme Court has spoken with equal emphasis as to mining properties, in *Patterson v. Hewitt*, 195 U.S. 309, 321, 25 S. Ct. 35, 49 L. Ed. 214 (1904):

"There is no class of property more subject to sudden and violent fluctuations of value than mining lands. A location which today may have no salable value may in a month become worth its millions . . . Under such circumstances, persons having claims to such property are bound to the utmost diligence in enforcing them, and there is no class of cases in which the doctrine of laches has been more relentlessly enforced."

"Sitting by idly" was condemned strongly in *Corey v. Sunburst Oil & Gas Co.*, 72 Mont. 383, 397, 399, 233 Pac. 909, 911, 912 (1923), cert. den. 268 U.S. 98, 45 S. Ct. 420, 69 L.

Ed. 865. There the timetable reflected an oil and gas lease dated May 29, 1920, on land then having little or no speculative sale for oil or gas rights; the discovery of oil in the same township on June 5, 1922, and suit started by the plaintiff landowner in May 1923 to declare the lease void. In 1920 the lessee-operator leased 50,000 acres or more in the supposed limits of the Rocky Ridge Dome, in order to warrant the expense of testing the dome. Relying on these leases, including the one in question, approximately \$25,000 was spent in exploring the area leading up to the June 1922 discovery.

Plaintiff claimed the lease was void as contravening the policy of Congress because he gave the lease before making final proof on his patent, and also that it violated a Montana statute. He urged that estoppel may not be predicated on a void instrument.

Considering that the validity of the lease was doubtful, the court twice hit at the inequity of plaintiff's position in sitting by idly:

"... Whether the land was valuable for oil or gas purposes was purely speculative. The plaintiff obtains patent, and then sits by observing the defendant's predecessor in interest spend huge sums of money in exploiting the field; oil is found in paying quantities in the vicinity of his land; his land becomes of great value by reason of the foregoing facts; almost a year after the oil is found he begins this suit; . . ."

"... Having been, according to his own theory, a party to an illegal contract, he now seeks to avail himself of that illegality to his own advantage and to the disadvantage of the other party. Having sat by while another expended toil and money in bringing forth riches, he would take the riches and leave the other nothing."

Several other cases in Montana warrant special mention in this field.

The first, *Hynes v. Silver Prince Mining Co.*, 86 Mont. 10,

18, 281 P. 548, 551 (1929) involved an action brought late in 1926 to quiet title to an undivided one-third interest in a mining claim, based on a contract of February 23, 1880. Mining activity in the area was at a "practical standstill" from 1880 until 1916 or 1917. Since then, defendants had been developing the property, expended over \$250,000, and at the time of trial the property was being operated at a profit. Holding it would be inequitable to allow plaintiff to recover the court said:

"Plaintiff has slept upon his rights, if any he ever had. His application is destitute of conscience, good faith, and reasonable diligence. It would be highly inequitable to permit him now, after defendants' enterprise and energy and the expenditure of enormous sums of money have developed the property and greatly increased its value, when the danger, which is over, was at defendants' risk, to assert ownership to an interest in the property and share in the profits."

To the same effect see: *O'Hanlon v. Ruby Gulch Mining Co.*, 64 Mont. 318, 328-330, 209 P. 1062 (1922).

The following decisions from other jurisdictions are to the same effect.

In *Hunt v. Pick*, 240 F. 2d 782, 786, (10th Cir. 1957), plaintiffs on June 7, 1955, sued for an accounting under an alleged oral mining partnership agreement made in 1952 covering uranium claims. Plaintiffs ceased working on the claims in September 1952, and were paid wages and other items of expense. The claims became a spectacular success.

In discussing the merits of plaintiff's claim, the court said:

"Nowhere in the law has the doctrine of laches been more strictly applied, and properly so, than in controversies involving mining claims. . . . And so, in applying the doctrine of laches, the emphasis is less upon the passage of time and more upon the effort expended and the risk taken for here, too, the reward should be preserved to him, who having discovered, proceeds to develop."

Also see:

Mason v. MacFadden
298 F. 384, (8th Cir. 1924);

Preston v. Kaw Pipe Line Co.
113 F. 2d 311, (10th Cir. 1940);

Winn v. Shugart
112 F. 2d 617, (10th Cir. 1940);

Stewart v. Dennis
208 Okl. 344, 255 P. 2d 923 (1952);

Murphy v. Johnson
54 S.W. 2d 158, (Tex. Civ. App. 1932);

Union Oil & Gas Co. v. Cross
220 Ky. 271, 295 S.W. 172, (1926)

Walker-Lucas-Hudson Oil Co. v. Hudson
168 Ark. 1098, 272 S.W. 836 (1925)

(3) In oil and mining cases, laches has been found although the period of time is relatively short.

Short periods of delay, accompanied by other circumstances, may constitute laches. This is reflected in *Patterson v. Hewitt*, 195 U.S. 309, 25 S. Ct. 35, 37, 49 L. Ed. 214 (1904), where it was said:

“Indeed, in some cases the diligence required is measured by months rather than by years. . . . And in others a delay of two, three, or four years has been held fatal.”

The foregoing excerpt was quoted by this Court in *Buchler v. Black*, 226 F. 703, at page 707, in which other cases involving short periods were reviewed.

A delay of 19 months in seeking rescission of the mining lease transaction constituted laches in *DeLamor Mines of Montana v. Mackay*, 104 F. 2d 271, (9th Cir. 1939).

United Fuel Gas Co. v. Cabot, 96 W. Va. 387, 122 S.E. 922 (1924), involved a very short period.

Parker v. Ryan, 143 Okl. 187, 287 P. 1006 (1930), was a suit for specific performance. Plaintiff was entitled to receive an interest in oil lands upon termination of certain litigation but waited about seven months before demanding performance. Shortly after a prolific oil well was completed on neighboring land. The court found him guilty of laches and denied relief.

Laches was sustained where 18 months elapsed between discovery of the facts and the action for rescission, oil having been discovered on the land in the meantime. *Brozen v. Privette*, 109 Okl. 1, 234 P. 577 (1925).

Eighteen months' delay in bringing suit to cancel a royalty conveyance after learning of the alleged fraud barred plaintiff by his laches in *Davis v. Godwin-Barclay Co.*, 120 Okl. 274, 251 P. 1042 (1926). It appears from the opinion that oil value of the land had increased during this period.

(4) Doctrine of laches as analogous to statute of limitations.

Appellants assert that courts apply the applicable statute of limitations in measuring the time required to support laches "except in the most unusual cases". Appellees assume that the unusual cases to which they refer are the oil and mining cases which appellees have covered and which appellants have carefully avoided.

As so aptly stated by this Court in *Gillons v. Shell Co. of Cal.*, 86 F. 2d 600, 610, (1936):

"In connection with the bar of laches, from the earliest days federal courts have emphasized the distinction between a reasonable and an unreasonable delay in bringing suit . . . even *within* the period designated by the statute of limitations."

A suit in equity may fail though not barred by the act of limitations. *Holmberg v. Armbrecht*, 327 U.S. 392, 396, 66 S. Ct. 582, 584, 90 L. Ed. 743, (1946).

(5) Effect of July 16, 1951 "cancellation notice" from appellant H. C. Smith and September 29, 1952 letter from appellant Cedar Creek to appellees, Fidelity Gas and Montana-Dakota.

It is clear that the July 16, 1951 letter (Ex. 30) from H. C. Smith and the September 29, 1952 letter (Ex. 37) from Cedar Creek were, at the most, mere assertions of a claim. There is ample authority that the mere assertion of a claim, with nothing more, will not defeat laches. In *Penn Mutual Life Ins. Co. v. City of Austin*, 168 U.S. 685, 18 S. Ct. 223, 228, 42 L. Ed. 626 (1898), the court referred to this doctrine as an elementary principle.

The trial court had before it all the evidence and an opportunity to judge the credibility of witnesses. The trial court properly expressed its discretion in sustaining the defense of laches, since it appears that:

- (a) The appellants sat by and did nothing from 1949 or earlier, or at least from April 27, 1951 until suit was filed February 2, 1953, with full knowledge of appellees' claims under the Fidelity Operating Agreement;
- (b) Tremendous expenditures were made by appellees during this period pursuant to the Fidelity Operating Agreements;
- (c) The values of oil and gas interests on the Cedar Creek Anticline, including appellants' lease, were greatly enhanced during this period as a result of appellees' work pursuant to the Fidelity Operating Agreement.

These factual elements have carried great weight in the decisions heretofore discussed. It is clear that appellants did not "press their claim" at the earliest possible time. *30 C.J.S. Equity*, § 118, p. 541. It is equally clear that appellees have been prejudiced by the delay and stand to lose not only the greatly increased value of their rights in appellants' leases under the

Fidelity Operating Agreement but, by force of an adverse decision, their identical rights in other lands on the Cedar Creek Anticline will be jeopardized.

2. ESTOPPEL

(1) Application of estoppel generally.

The tendency to blend the terms "laches" and "estoppel" is noted in 19 Am. Jur., Equity, § 493, p. 341:

"References are found in the reports to 'the doctrine of estoppel by laches' (citing *Northern P. R. Co. v. Boyd*, 228 U.S. 482, 33 S. Ct. 554, 57 L. Ed. 931), and to the fact that by reason of laches a complainant is 'barred and estopped' from maintaining a suit."

The distinction is pointed out in 19 Am. Jur., Estoppel, § 38, p. 637, where it is observed:

"The doctrines of laches and estoppel are closely related especially where, as is the case in most jurisdictions, delay alone is not regarded as constituting laches, but only delay which places another at a disadvantage. Laches is sometimes spoken of as a species of estoppel and is often an element in estoppel. Clearly, however, the terms are not synonymous since laches is a doctrine peculiar to courts of equity while the doctrine of estoppel is applied as readily at law as in equity. Moreover, laches is a wholly negative thing so far as concerns the party against which it is asserted, while estoppel may involve affirmative action on his part."

This court noted this distinction in even clearer terms in *Gilbons v. Shell Co. of California*, 86 F. 2d 600, 607 (9th Cir. 1936).

The distinctly different defense of estoppel is treated at great length by appellants, almost to the exclusion of "laches" and "waiver". (Brief 19-49)

Woven throughout this portion of their brief are assertions of fact which fight, not only the inferences which the trial court rightly made, but the facts reflected by the record.

After a review of the general legal principles on estoppel,

appellants seek to knock out the trial court's findings as to certain elements of estoppel.

(2) Finding of reliance by Shell on the Fidelity Operating Agreement is supported by evidence.

It is said there is no proof that Shell relied upon the Fidelity Operating Agreements in entering into its April 10, 1951 operating agreement with Fidelity and Montana-Dakota. Complaint is made of appellees' failure to call as witnesses "officers of the defendant Shell who negotiated the agreement". (Brief, 29) The argument boils down to a contention that there must be express, self serving declaration testimony that "we relied upon the Fidelity Operating Agreement" in order to support the trial court's finding of reliance. (Findings XXIII, XXV, Tr. 196, 197) This argument ignores the well established principle that an inference can be drawn from the facts proven. Had appellants continued with the excerpt from 31 C.J.S. Estoppel § 162, p. 458, at page 26 of their brief, there would be added:

" . . . However, reliance on the representations of another need not be proved by direct evidence, but may be inferred from circumstances. The intention that another should act on a representation or concealment may also be inferred from circumstances."

The rule that the decision of any issue in a civil case may rest entirely on circumstantial evidence has been consistently followed in Montana and recognized by this Court.

Doncy v. Ellison
103 Mont. 591, 64 P. 2d 348, 350 (1937);

Fegles Construction Co. v.
McLaughlin Construction Co.
205 F. 2d 637 (9th Cir. 1953).

Illustrative of the many applications of the principle to "reliance" in estoppel cases is *Ste. Marie v. Wells*, 93 Vt. 398, 108 A. 270 (1919) stating:

“The plaintiff did not testify in terms that he acted in reliance upon defendant’s representations in the purchase of the farm. But there is ample authority for the proposition that the fact of reliance need not be proved by direct evidence, but may be inferred from the circumstances . . .”

Appellants’ contention that the court erred in finding estoppel is based on the false premise, that there was no evidence appellees relied on the Fidelity Operating Agreements, since their officers and agents were not called to say in so many words: “Yes, we relied on the agreements.” Appellants fail to give any weight to circumstantial and indirect evidence and the deductions and inferences which must be made from established facts.

Uncontradicted evidence first established the Cedar Creek Anticline as one structure. (Tr. 490) The Fidelity Operating Agreements covered 90 percent of the acreage from Unit 1 to and including Units 8A and 8B. (Tr. 539) The very inception indicates that Fidelity did not propose to undertake a test well without having signed agreements on most of the Anticline. Carter, Husky and Shell made sure they had essential control of Anticline lands before undertaking expensive drilling and development. California was interested in taking over interests on the entire Anticline. (Tr. 512) The testimony of Barnes (Tr. 682) and Davies (Tr. 512) points out the desirability of controlling a block of acreage within a structure to be explored. The control of acreage on a structure as a prerequisite to wildcat drilling is so well known to the public and the industry as to be classed as common knowledge of which courts take judicial notice. Before actual discovery and subsequent exploration no one could with certainty say whether appellants’ acreage or some other area would prove productive. As compensation for large expenditures in wildcat drilling, agreements covering what was felt might be productive areas were obtained. If each signer

to a Fidelity Operating Agreement could have it cancelled because a Shell official did not testify about reliance on that particular agreement, so could each of the other signers and there would be nothing left. Shell, like Fidelity, California, Carter and Husky, were relying on the overall development rights on the whole anticline. The appellants' argument that there was no showing of any reliance on the agreements covering appellants' acreage, is to say that it would not matter if substantial acreage is taken from the approximate center of a long, narrow structure or anticline in which Professor DeWolf testified: "You may find oil, in my opinion, in various places on that structure now, rather than to expect it all to migrate up to the high end of the structure." (p. 491)

Common sense dictates that Shell did not undertake the expensive drilling program unless it had effective control of the Anticline. The Shell Operating Agreement did not "relate primarily to Units 8A and 8B of the Cedar Creek Anticline" as stated by appellants (Brief, 31) but covered Units 1 through 8B. (Ex. 5, p. 1)

Appellants' distorted version of the trial court findings should be corrected. The court found reliance on the fact that the Fidelity Operating Agreements covering appellants' interests, *and other similar interests on the Cedar Creek Anticline* were valid (Finding XXV, Tr. 197) and not, as appellants state: "that all of Shell's activities were in reliance on the validity of the Fidelity Agreements as they affected appellants' lands." (Brief, 32)

Next, appellants assert a novel but nebulous theory regarding the trial court's findings on Shell's expenditures. They say, as appellees understand it, that Shell risked nothing because, under the Fidelity Operating Agreement, it is entitled to reimbursement before appellees receive their 25% net proceeds. This is, indeed, putting the cart before the horse. The risk comes first,

the hoped for rewards later. (Brief, 35-36)

(3) Shell had no knowledge of appellants' claims nor reason to believe such claims existed.

Appellants argue that Shell knew or should have known of their claim. (Brief, 48)

To show actual knowledge by Shell they rely on:

1. A notice of cancellation from appellant, Susan Wight (Ex. 15) sent "some time in 1950". (Brief, 39)
2. Alleged conversations with a Shell representative or representatives. (Brief 39, 40)
3. A letter dated July 16, 1951 from appellant, H. C. Smith. (Brief, 41)
4. A letter dated September 12, 1952, from Cedar Creek.

Each can be dealt with summarily.

The Susan Wight notice (Ex. 15) has nothing to do with the Fidelity Operating Agreement. It simply purports to cancel paragraph 3 of a gas unit agreement and was directed only to Montana-Dakota.

The H. C. Smith letter (Ex. 30) was not sent to Shell; only to appellees Fidelity and Montana-Dakota. Out of thin air appellants say Shell "knew of it at the time it was received." (Brief, 41) The trial court noted that Smith's letter "does hereby declare forfeited and cancelled any unit or option" claimed by Fidelity or Montana-Dakota under the old operating agreements, and pointed out its ineffectiveness as a notice of default under paragraph 2 of the Fidelity Operating Agreement. (Tr. 180)

The letter of September 12, 1952 (Ex. 37) from appellant Cedar Creek was not sent to Shell; only to appellees Fidelity and Montana-Dakota and then only, as the trial court put it,

“over a year after Cedar Creek, through Mr. Jirik, had learned of the Shell agreement, and by the time of that letter a number of successful wells had been completed by Shell and the lands and leases of the plaintiffs had been greatly enhanced in value.” (Tr. 180)

Appellants then go on to say, in effect, that, absent actual knowledge, Shell should have known of appellants' claims. They contend that the language of the Fidelity Operating Agreement coupled with Shell's knowledge of operations under it placed Shell under a duty to inquire of appellants as to any claims they might have. (Brief, 42-45) The trial court, viewing all evidence, found otherwise. In doing so, it probably gave weight to the fact that appellants never notified Fidelity or Montana-Dakota of their claims, prior to the making of the Shell Operating Agreement of April 10, 1951. It no doubt gave weight to the fact that neither appellants nor their leader, John Wight, ever asked Fidelity for a release of the Fidelity Operating Agreements; the net result they are seeking in this action. (Tr. 572, 683)

Shell's conviction and belief that operations under the Fidelity Operating Agreements had been adequately carried out is strongly supported by the fact that it undertook under the Shell Operating Agreement, expensive obligations. It is evident that Shell knew of the costly dry hole just completed by Husky Refining under the Fidelity Operating Agreement and the previous operations under the agreement; and the purely wildcat nature of the area, its remoteness from markets, the high cost of drilling, and the extensive preliminary geophysical work involved.

The trial court, by necessary implication, correctly concluded that it was not incumbent on Shell to search out each “First Party” under each Fidelity Operating Agreement to ascertain whether anyone was claiming termination. Was it necessary for

Shell to seek out specifically the appellants who, as they say, have but 3% of the acreage held by Shell under its Operating Agreement? Would it have been sufficient had Shell contacted only the holders of the other 97% of the acreage? These questions can be resolved only by concluding, as did the trial court, that no such duty existed in these circumstances.

(4) The appellants were silent when they had a duty to speak, at least after April 27, 1951.

Appellees have shown, at pages 23-26, *supra*, that appellants knew Fidelity was continuing to claim its rights under the Fidelity Agreement in 1949.

The letters of April 27, 1951 (Ex. 26) expressly advised each appellant that all Fidelity agreements had been committed to the Shell agreement and Shell was to commence a deep test well within 90 days on the Anticline. There can be no doubt that each appellant then knew Shell intended to make huge outlays on the strength of the Fidelity agreements. Then, if ever, arose a duty to speak, yet appellants remained silent.

Appellants cite and discuss *Bozacs v. Republic Oil Company*, 78 Mont. 134, 252 P. 800 (1927) as authority for the position that appellants were required to do nothing under the foregoing situation. (Brief, 48, 49)

In the *Bozacs case* the lease provided that unless a test well was commenced and drilling prosecuted with due diligence on plaintiff's land or within a radius of 3 miles by July 1, 1921, the lease would be null and void. Defendant-lessee failed to meet this deadline, but did, in 1923, do some drilling within the 3-mile radius which was in progress at the time of trial. Such drilling, off the land of plaintiff was held not to estop him from asserting forfeiture.

The *Bozacs case* is distinguishable in an important respect.

In the *Bowes* the lease was dead. No one contended that the lessee had prosecuted drilling operations with due diligence as required to keep the lease alive under its express terms. Here Fidelity did the exploratory work and drilled the initial test well required under the Fidelity Operating Agreement.

Here, too, the equities lie much stronger in favor of appellees. The application of equitable estoppel is not governed by mechanical rules. In *Lindblom v. Employers' Liability Assur. Corp.*, 88 Mont. 488, 295 P. 1007, 1009 (1930) the court quoted with approval the following from 10 R.C.L. 689:

"Equitable estoppels operate as effectually as technical estoppels. They cannot in the nature of things be subjected to fixed and settled rules of universal application, like legal estoppels, nor hampered by the narrow confines of technical formula. So, while the attempted definitions of such an estoppel are numerous, few of them can be considered satisfactory, for the reason that an equitable estoppel rests largely on the facts and circumstances of the particular case."

Appellants pose the question as to what would happen if they had immediately notified appellants of their claim upon the receipt of the letter of April 27, 1951. (Brief, 47) This is pure speculation in which there is no need to indulge.

3. WAIVER

Waiver may be predicated on neglect and failing to act, as to induce a belief that it is the intention and purpose to waive. *Northwestern F & M Ins. Co. v. Pollard*, 74 Mont. 142, 238 P. 594 (1925).

The evidence referred to in the argument on laches and estoppel supports the defense of waiver. The trial court was warranted in concluding that appellants' neglect and failure to act, amounted to an intention to waive their claims that the Fidelity Operating Agreement had terminated.

3.

Under the provisions of paragraphs 4 and 6 of the Fidelity Operating Agreement, appellees were permitted to exercise their discretion as to the extent of further drilling, provided they acted in good faith.

Under paragraph 4 of the Fidelity Operating Agreement, after drilling an uncommercial test well, further development was left to Fidelity's judgment, ". . . as shall be deemed by it to be good oil field practice . . ." Similar provisions in oil and gas leases have been considered by the courts. From their decisions there has been established the rule aptly stated by Professor Summers in his work as follows:

"Where, however, the lessor expressly agrees that development shall be at the *discretion of the lessee*, a covenant of reasonable development will not be implied and *the standard of performance is the good faith judgment of the lessee*." (Emphasis supplied) (2 Summers, Oil and Gas, § 398, p. 143, 1956 pocket part)

It is significant that in paragraph 4, dealing with development after completing an uncommercial test well, further drilling was to be at such times "*as shall be deemed by it* to be good oil field practice"; but in paragraph 5, having to do with further drilling after discovery of oil in paying quantities, further drilling must be in accordance "with good oil field practice". Note the omission of the words; "*as shall be deemed by it*". This is indicative of the mutual intention to give a wide discretion to Fidelity until its exploratory operations were successful and then require drilling in accordance with a fixed standard, "good oil field practice", and not what Fidelity "deemed" good oil field practice. Additional evidence of the intention to allow a wide exercise of discretion and judgment, except where otherwise specifically provided, is found in paragraph 6 as follows:

"Except as otherwise herein specifically provided,

second party shall be free to exercise its sole discretion and judgment in the performance of the terms of said leases, permits and agreements, in the developments of said lands, in the location, drilling, operation and production of all wells, and the sale, handling, disposition, treatment of and contracting in respect to all substances produced by it from said lands herein described."

Cases specifically considering similar provisions of oil and gas leases uniformly apply the rule announced by Professor Summers, *supra*.

The lease involved in *Winship v. Wilkes*, 121 Cal. App. 44, 8 P. 2d 502, 504 (1932) contained an obligation to drill to a designated depth, "unless oil at a lesser depth is discovered in quantities deemed paying quantities by the lessee." The court held that the contract left the extent of discovery to the sound judgment and discretion of the lessee; but pointed out that such judgment could not be arbitrarily or unreasonably exercised. In referring to the meaning of the words "deemed paying . . . by the lessee" it said:

"The words 'deemed by the lessee' need no construction. The word 'deem' is not an unusual word, nor has its use been confined to legal phraseology. It is a word in common use, and imports, in all of its shades, some idea of discretion and opinion. To deem is to think, judge, hold as an opinion, decide, or believe on consideration, to adjudge."

In *Cowden v. Broderick & Calvert*, 131 Tex. 434, 114 S.W. 2d 1166, 1171, 117 A.L.R. 61 (1938) the lease in question provided: "Lessor agrees that all other development shall be at the discretion of the lessee." The court held that the obligation thus expressed was not the same as "reasonable development" arising under the implied covenant and that "discretion" means freedom to act according to honest judgment. Accordingly, it was held that the trial court erred in sustaining a general de-

murrer to the petition of the plaintiff-lessor, which alleged that the lessees had not exercised their discretion in good faith but had abused such discretion in refusing to drill additional wells.

Daurer v. Sun Oil Co., 125 F. 2d 246, (5th Cir. 1942) was brought by the lessor to obtain an alternative decree against the assignee of the lease requiring it to proceed with development within "a reasonable time", or that the lease be terminated except as to areas surrounding existing wells. The lease provided that "the location of wells, extent of operation and all matters incidental thereto shall be only such as lessee in its business judgment deems best", and, further, that "there shall be no implied covenants read into this lease." The court pointed out that the express provision governing further development was controlling and that the prohibition against implying covenants merely emphasized such feature of the agreement. A judgment dismissing the action on motion of the defendants was therefore affirmed.

To the same effect see:

Adkins v. Adams, 152 F. 2d 489, (7th Cir. 1945) (operations at such time and in such manner as lessee "may elect").

Skinner v. Ajax Portland Cement Co., 109 Kan. 72, 197 P. 875 (1921) ("entirely optional with the lessee" as to when it shall be obliged to drill).

Warren v. Amerada Petroleum Corp., 211 S.W. 2d 314 (Tex. Civ. App., 1948) (Operations to be conducted "at will" of lessee).

Gulf Production Co. v. Kishi, 129 Tex. 487, 103 S.W. 2d 965 (1937) (number of wells designated).

In the final analysis, the foregoing authorities are nothing more than applications of the general law as to contracts requiring performance to the obligee's satisfaction.

See Williston, Contracts, sec. 675A
(Rev. Ed. 1936).

The Supreme Court of Montana recognized and applied the doctrine in *McCrimmon v. Murray*, 43 Mont. 457, 117 P. 73 (1911). There the plaintiff agreed to furnish defendant information concerning a vein of ore within the boundaries of a lode claim, for which defendant agreed to pay a certain percent of the selling price of the claim, if on investigation by defendant, the information should be "satisfactory" to him. The court held that defendant had the exclusive right to determine whether the information was satisfactory and that his judgment was controlling and to be deemed conclusive, though it was to be exercised honestly and in good faith.

See also: *Waite v. Shoemaker & Co.*
50 Mont. 264, 146 Pac. 736 (1915)

At the trial of this cause, appellees introduced evidence demonstrating their performance of the terms and conditions of the Fidelity Operating Agreement, which has been summarized in tabular form on pages 17, 18 of this brief. This evidence stands uncontradicted and unrefuted.

a. Appellants were required to plead and prove Fidelity's lack of good faith in exercising its discretion with reference to further exploratory drilling.

Appellants made no effort to assume and carry the burden of showing that appellees' activities failed to meet the test of good faith. They made no effort to show abuse of discretion. In the absence of such showing, appellees' performance must be deemed to have been accomplished in good faith. In fact, section 93-1301-7(19) R.C.M. 1947, creates a disputable presumption "that private transactions have been fair and regular." The law always presumes good faith, never fraud.

Greer v. Stannard
85 Mont. 78, 277 P. 622 (1929)
20 Am. Jur., Evidence, § 229, p. 223

The reply filed by appellants fails to allege bad faith or abuse of discretion. (Tr. 101-112) In *Magnolia Petroleum Co. v. Page*, 141 S.W. 2d 691 (Tex. Civ. App. 1940) the lease in question contained an express covenant providing that "The judgment of the lessee, where not fraudulently exercised, in carrying out the purpose of this lease, shall be conclusive". In the light of such provision, the court held that before lessors could recover, they must allege not only that lessee did not use due diligence but, also, that lessee had been guilty of bad faith.

b. Covenants will not be implied where the standard of development is expressly covered in the agreement.

In some of the cases cited, supra, in this section of the brief, an effort was made to have the courts imply covenants for development within a reasonable time, notwithstanding express agreements that development would be at discretion of lessee. Typical is the case of *Warren v. Amcrada Petroleum Co.*, 211 S.W. 2d 314, 317, (Tex. Civ. App. 1948), where the lease gave the lessee the right "at will" to begin, abandon or resume operation. This quotation from the opinion is pertinent:

"Appellant contends there is an implied covenant in the original lease between Bell and lessee to the effect that drilling must begin on the lease within a reasonable time. In the absence of an express stipulation in leases, the courts will imply a covenant to drill only in the event a reasonable, prudent operator would do so. But there is no room for an implied covenant where the lease contract itself makes the matter of development discretionary with lessee at his own will as was obviously the case in the original lease executed by Bell to lessee. The terms of that lease and the intention of the parties are clearly expressed in plain language and the courts will not undertake to write a new and different contract or to change the terms of one when the parties have stated their intentions clearly and in simple language. (c.c.) The original

lease above referred to contains an express covenant which precludes the application of any implied covenant for prudent development or for development within a reasonable time." (c.c.)

The same conclusions were reached in other decisions where the leases authorized the lessee to use his discretion on future or further development.

Magnolia Petroleum Co. v. Page
141 S.W. 2d 691, 693, (Tex. Civ. App. 1940)

Gulf Production Co. v. Kishi
129 Tex. 487, 103 S.W. 2d 965, 970 (1937)

Cowden v. Broderick & Calvert
131 Tex. 434, 114 S.W. 2d 1166, 1171,
117 A.L.R. 61 (1938)

Adkins v. Adams
152 F. 2d 489, 491, (7th Cir. 1945)

It may be argued that it would be unreasonable to allow appellees the exercise of discretion, since this could result in no drilling at all. The application of the rule does not permit that situation to arise. It merely shifts the standard from "reasonable development" or "good oil field practice" to that of good faith judgment of appellees. This does not permit the use of arbitrary will or inconsiderate action, it is merely the freedom to act according to honest judgment. The acts of the appellees, culminating in the successful development of oil from Cedar Creek Anticline, are described in detail in the record. It is submitted they show the exercise of an honest judgment. This view is also consistent with an application of the rule that parties are free to contract; and courts will not make a new contract for them. See: *Dauer v. Sun Oil Co.*; *Cowden v. Broderick & Calvert*; and *Adkins v. Adams*, *supra*.

By way of summary, it is evident (1) that paragraph 4 of the Fidelity Operating Agreement vested Fidelity and its successors with the right to determine when further drilling was

to be accomplished; (2) that such determination is controlling and conclusive in the absence of bad faith or abuse of discretion; (3) that appellants failed to assume and carry the burden of showing bad faith or abuse of discretion; and (4) covenants will not be implied to defeat the expressed intent of the parties.

In the briefs before the trial court the appellants' argument on construction of paragraph 4 was directed primarily to its automatic termination for failure to drill. Appellees countered that the maximum requirement for further drilling, after completing an uncommercial test well, was good oil field practice. The court found with appellees but concluded that performance could not be determined without testimony on good oil field practice. This determination indicated the necessity for further briefing which brought to appellees attention the cases cited on pages 44-50, *supra*, supporting the rule, that if the lessor agrees future development shall be at the discretion of the lessee, the standard of performance is the good faith judgment of the lessee and not the normally implied covenant of good oil field practice.

4.

Appellants were required to give notice of appellees' default occurring under express and implied duty to drill or develop.

Appellants contend there is an implied covenant, under the Fidelity Operating Agreement, to "explore, drill and develop the lands in question with reasonable diligence" and the court erred in failing to find that it had been breached. (Brief, 69-72)

Appellants cannot contend there is an implied obligation to diligently explore, drill and develop each tract covered by the many Fidelity Operating Agreements, for such claim would be contrary to the purpose and express provisions of the Fidel-

ity Operating Agreement. Under that agreement appellants are not entitled to development of their respective lands, until drilling has progressed to them from present productive areas. (Paragraph 5) Appellees agree that after discovery on the specific lands, reasonable diligence would be required as to further drilling thereon, under express or implied terms of the respective leases.

If appellants are referring to an implied covenant to explore and develop within the Cedar Creek Anticline, then it will be found that the proposed implied covenants, would conflict with paragraph 4 of the agreement. It provides that if the test well is nonproductive, Fidelity may "prosecute such further drilling . . . at such times as shall be deemed by it good oil field practice, having due regard that the drilling operations hereunder are purely exploratory and speculative . . ."

In section 3 of this brief at pages 48, 49, 50 appellees have shown that in the face of express covenants the law does not imply covenants.

(1) Notice under implied covenants.

Assuming, for purpose of argument, that the law of implied covenants is applicable to the case at bar, appellants cannot prevail. It is universally recognized that if a lessor desires to terminate a lease for breach of one or more of the implied covenants, he must notify the lessee and afford a reasonable opportunity to remedy the situation, even in cases where the lease is silent on the question of notice.

3 Summers, Oil and Gas, § 469, pp. 164-169.

58 C.J.S. § 205 (2) (a), p. 514.

Berthelote v. Loy Oil Company, 95 Mont. 434, 446, 28 P. (2d) 187 (1933) cited by appellants, is a leading Montana case on the law of implied covenants. Appellants in citing this

case failed to reveal that notice of forfeiture was given. Furthermore, the court indicated that before a breach of an implied covenant could be claimed as substantial, the necessity for protecting the leased premises from drainage must be brought home to the lessee in some manner by reasonable notice or demand on the part of the lessor.

In an opinion of the supreme court handed down June 17, 1955, *Fcy v. A. A. Oil Corporation*, Mont., 285 P. (2d) 578, 586, it was said with reference to forfeiture of an oil and gas lease: "The rule is clear that the lessor who intends to claim forfeiture, where development is an element, has the duty to demand that development proceed or commence."

It has also been held that a notice to forfeit an operating agreement is not sufficient where it fails to specify the particular way or manner in which there has been a failure to comply with the agreement. On this point it was said in *Atlantic-Pacific Oil Co. v. Gas Development Co.*, 105 Mont. 1, 26, 69 P. (2d) 750 (1937):

"Wight, in conjunction with the permittees, gave the notices of cancellation, and, in giving the notices, assigned no reason for the act, nor specified the particular manner or way in which the plaintiff had failed to comply with any provisions of the agreements. Before any right to cancel could arise or be exercised, we think it was necessary that Wight, and possibly the permittees, give timely notice and call attention or show wherein Stokes or his assignees had failed to comply with such agreements."

Appellants express the view that *Sauder v. Mid-Continent Petroleum Co.*, 292 U.S. 272, 54 S. Ct. 671, is "a case in which the facts are strikingly similar to those" before this court. (Brief, 71) The facts of the Sauder case are not similar. In it the Supreme Court was dealing with an ordinary oil and gas lease. Lessee had held it for 17 years and had drilled two

offset wells which were small producers. The leased lands consisted of 360 acres. At the expiration of the primary ten-year term lessor gave notice of cancellation for failure to develop and the lessee refused to drill additional wells. In response, the lessee expressly stated that it was not willing to drill a well. Even under these circumstances, the Supreme Court of the United States held that, so justice might be done, defendant should be given an opportunity to correct the breach complained of before having its lease cancelled.

Brewster v. Lanyon Zinc Company, 140 Fed. 801, and *Berthelote v. Loy Oil Co.*, 95 Mont. 434, 28 P. (2d) 187, were decisions, where there had been discovery under an oil and gas lease but no further development. They are like the Sauder case. The rulings in these cases would be more applicable if appellees had drilled a producing well on lands covered by a specific Fidelity Operating Agreement and then refused to develop the balance of the acreage.

(2) Under expressed covenants.

Paragraph 2 of Fidelity Operating Agreement provides in part as follows:

“Forfeiture of all of the rights of second party as to respective lands upon which it shall be in default in the performance of the drilling, operating or producing obligations under this agreement and its failure to proceed to remedy such default within thirty (30) days after receipt of written notice from first party thereof, shall be the exclusive remedy of first party against second party on account of any such default hereunder; and default in drilling of the test well as hereinafter provided shall be deemed default as to all of the lands subject thereto.”

It is conceded that the test well was drilled within the time provided and in accordance with the requirements of the Fidelity Operating Agreement. Further drilling on the structure was to

be prosecuted as deemed by Fidelity to be good oil field practice having due regard that the drilling operation was purely exploratory and speculative. It is here that appellants claim there was a default. Appellees say there was compliance, but if appellants considered them in default, they were entitled to notice under paragraph 2 and the general rules governing forfeiture.

The situation is not unlike that considered in *Consolidated Gas Co. v. Rieckhoff*, 116 Mont. 1, 6, 151 Pac. (2d) 588 (1944). The lease called for commencement of a well in two years. The term was extended and within the extended term a well was commenced. It was also provided that drilling would be prosecuted with due diligence to a certain horizon and in case of failure in that respect the lease would terminate, after written notice specifying the default unless the default was remedied in thirty days. The court in holding the complaint did not state a cause of action because it failed to allege the giving of notice said:

“Since there is no question but that the well was commenced in time, the only thing which can operate to terminate the contract would be a breach of the covenant to diligently perform. Before the question of diligence can be litigated, the plaintiff must, under the terms of the agreement, allege and prove that a notice of default was given and no sufficient effort to remedy the default was made. This was not done and we must therefore hold that the complaint fails to state facts to constitute a cause of action.”

This rule was again affirmed by our supreme court in *Fey v. A. A. Oil Corp.*, Mont., 285 P. (2d) 578, 586 (1955). After recognizing that the policy of the law is to favor forfeiture of oil and gas leases the court said: “still ‘One who seeks to enforce a forfeiture must himself be free from blame’.” 37 C.J.S., Forfeitures, § 5 a, p. 11. The rule is clear that the lessor who intends to claim forfeiture, where development is

an element, has the duty to demand that development proceed or commence."

The rationale represented by the quoted language constitutes the general rule:

58 C.J.S., Mines and Minerals, § 205 (2) (a), p. 514.

3 Summers, Oil and Gas, § 469, pp. 163-167.

Furthermore, it is universally recognized that where contracts specifically provide that the remedies enumerated therein shall be the only course of action, parties to it are limited to the remedies provided therein.

Wing v. Brasher

59 Mont. 10, 20, 194 Pac. 1106 (1921);

J. M. Hamilton Co. v. Battson

99 Mont. 583, 44 P. (2d) 1064 (1935);

White v. Jewett

106 Mont. 416, 78 P. (2d) 85 (1938);

17 C.J.S. Contracts, § 523, p. 1145

The trial court found by Finding of Fact XXVIII, that:

"At no time have the plaintiffs, or any of them, served a written notice of default upon any of the defendants, with respect to the performance of drilling, operating or producing obligations of the Fidelity Operating Agreements." (Tr. 198)

However, in the memorandum the court, after considering the effect of paragraph 4, said:

"The forfeiture clause in Paragraph 2 would have no application to this situation, because the clause provides for notice of forfeiture only in case of default in drilling, operating or producing obligations, and as stated before, there was no obligation on Fidelity to drill, if the test well was unsuccessful. It is not reasonable to believe plaintiffs would accede to any such arrangement, and only by holding that Paragraph 4 granted an option can a reasonable result be arrived at." (Tr. 174)

Appellees contend this is too strict an interpretation of para-

graph 2 and especially the word "obligation". Following section 13-707 R.C.M. 1947 and looking to the whole contract, "so as to give effect to every part", it appears that the reference in paragraph 2 to "obligation" was not intended to cover only obligations, covenants, and absolute duties for which damages might have been claimed upon breach. While it is true Fidelity could not have been sued for damages for its failure to drill additional wells after the uncommercial test, its failure to do so would have been cause for forfeiture of its rights under the Fidelity Operating Agreement. The drilling after an uncommercial test well was in the nature of a conditional obligation or more specifically a condition subsequent. This placed a "duty" or "obligation" on Fidelity to drill in accordance with its fair and honest judgment as to what was good oil field practice, if it were to retain the rights and estate acquired through the agreements and the drilling of a test well.

The codes of Montana define most of the words and terms under consideration:

Obligation is defined in section 58-101 as: "An obligation is a legal duty, by which a person is bound to do or not to do a certain thing."

Next of importance is section 58-204 dealing with conditional obligations. It provides: "An obligation is conditional, when the rights or duties of any party thereto depend upon the occurrence of an uncertain event."

And section 58-205 sets forth the kinds of conditions as follows: "Conditions may be precedent, concurrent, or subsequent."

Of importance also is the definition of "condition subsequent" found in section 58-208. It provides: "A condition subsequent is one referring to a future event, upon the happening of which the obligation becomes no longer binding upon the other party, if he chooses to avail himself of the condition."

In determining whether a particular provision is a condition or a covenant the intention of the parties is to be determined from the agreement. See *Atlantic-Pacific Oil Co. v. Gas Div. Co.*, 105 Mont. 1, 18, 20, 69 P. (2d) 750 (1937). This case also defines a "covenant" in the exact statutory language of section 58-101, namely: "an agreement between the parties to do or not to do a particular act".

In addition to preliminary geological examination and drilling of a test well as required in paragraph 3, further drilling was to be done in event of production from a test well under paragraph 5, and also if the test well was uncommercial as provided in paragraph 4. There appears to be no logical reason why the parties would provide for notice of forfeiture in the instance of drilling pertaining to the test well and not the others. The word "obligation" is to be understood in its "ordinary and popular sense, rather than according to . . . strict legal meaning." This is the mandate of section 13-710, R.C.M. 1947, which provides:

"The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning, unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed."

The forfeiture clause deals first with the "respective" lands under agreement in providing: "Forfeiture of all rights . . . as to *respective lands* upon which it shall be in default in the performance of the drilling, operating or producing operations . . ." may be forfeited on notice. Then follows this special provision about the failure to drill the test well; "and default in drilling of the test well . . . shall be deemed default as to all lands . . ."

Appellants at pages 70 and 71 of their brief, cite the case of *Brewster v. Lanyon Zinc Co.*, 140 F. 801, 812 (8th Cir. 1905)

with reference to implied covenants. The Brewster decision supports the appellees' interpretation of the forfeiture clause. The forfeiture clause of the Fidelity Operating Agreement refers to "obligations" and appellees contend it also includes "conditions". In the Brewster case the forfeiture clause referred to "any of the above conditions" and it was contended that this did not include "covenants". The court held that in determining scope and effect of the forfeiture clause it must look "not merely to the letter, but to the spirit and legal effect" of the entire agreement. Accordingly the court held, that the provisions for forfeiture referred to the expressed and implied covenants of the lease, including the implied covenants for reasonable development. The portion of the opinion on this point reads:

"But, however this may be, the present insistence is not well grounded. The question is essentially one of intention (c.c.) and the words 'any of the above conditions' must be given effect in the sense in which they were used by the parties. They are very comprehensive, and were evidently designed to refer, not merely to the letter, but to the spirit and legal effect of the preceding stipulations, and therefore to every covenant of the lessee which is part of them. The error in the insistence to the contrary is that it fails to give effect to the well-established rule that a covenant arising by necessary implication is as much a part of the contract—is as effectually one of its terms—as if it had been plainly expressed. (c.c.)

"The conclusion is that compliance with a covenant to continue with reasonable diligence the work of exploration, development, and production after the expiration of the five-year period, if during that time oil and gas, one or both, be found in paying quantities, is by the terms employed made a condition the breach of which entitles the lessor to avoid the lease."

The *Brewster* decision was considered in *Gulf Production Co. v. Kishi*, 103 S.W. 2d 965, 970, 971, 129 Tex. 487 (1937). In the *Kishi* case the court refused to imply covenants for develop-

ment as the lease specified the number of wells. What was said by the court with reference to an implied covenant to develop, applies with equal force to an express condition such as paragraph 4 of the Fidelity agreements:

“Because of the peculiar nature of the estate created by an oil and gas lease, the implied covenant for development is not a true covenant; that is, it does not impose a continuing, enforceable duty. The lessee may elect to permit the lease to terminate by ceasing to devote the premises to the purpose of oil and gas exploration, development, and production and thereby rid himself of the implied obligation, but the obligation continues as long as the lease is kept alive. . . . The express stipulation for development contained in the leases and the covenant for development implied in the absence of express stipulation have in a practical sense the same purpose, the development of the leased premises, and the obligation imposed by the express stipulations, like that implied, exists only while the lease is kept alive.”

John Wight, who has been the moving spirit in this litigation, was well aware of the forfeiture clause contained in paragraph 2. On September 12, 1952, in writing to George H. Seivers, Secretary-Treasurer of Cedar Creek Oil and Gas Company concerning a form of notice to be sent to Fidelity, he cautioned:

“You should be very careful, though, if you change any of the wording so that you are not declaring a forfeiture at this time because, if so, that would give them the right to go in and cure the defect by commencing the drilling a deep test well which, of course, they would be glad to do.” (Ex. 6, Tr. 328)

5.

The Fidelity Operating Agreements have not, as claimed by appellants, expired under their own terms.

- (1) **This contention is contrary to expressed provisions of paragraph 4 and inconsistent**

with other provisions of Fidelity Operating Agreement.

The burden of appellants' argument appears to rest on a strained effort to show an expressed limit under paragraph 4 requiring a well each year. Appellants would have the court decree that the words "good oil field practice" found in paragraph 4 relate only to "weather, season and roads". (Brief, 60) The last paragraph of page 60 lightly suggests that since drilling of the test well had to commence within one year from the execution of the operating agreements, there had to be under paragraph 4 at least one well a year.

The whole of a contract must be considered together under section 13-707, R.C.M., 1947, which provides:

"The whole of the contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."

Citing the quoted section, the Supreme Court of Montana in *State v. Rosman*, 84 Mont. 207, 217, 274 Pac. 850 (1929), said:

"In the interpretation of this contract we must call to our aid certain elementary rules. The intention of the parties is to be pursued if possible . . . This intention is to be gathered from the entire agreement, *not from particular words or phrases* or disjointed or particular parts of it."

When the parties wished to express fixed drilling limitations they found no difficulty. Thus we see in paragraph 3 with reference to drilling of the test well a specific provision that "second party will commence drilling operations for drilling such well within *one year* from the date of execution of operating agreements . . ." Again in paragraph 5, which provides for further drilling after commercial production is found on the structure, further drilling must be commenced in Units 2, 3, 4 or 5, "within *one year* after completion of such first commercial oil well." Why was not similar language used in para-

graph 4, if the parties intended to require drilling in one year? Appellants' argument is not only inconsistent with the other provisions of the Fidelity Operating Agreement but is contrary to the express provisions of paragraph 4 wherein it states; that further drilling shall be "at such times as shall be deemed by it to be good oil field practice, *inability*"

Appellees frankly confess *inability* to follow appellants' argument that the reference in paragraph 4 to good oil field practice seems "clearly to relate to weather, season and roads." The obvious purpose of this provision was to avoid costly and almost impossible drilling conditions in wide open spaces of Cedar Creek Anticline during winter months.

(2) The conduct of appellee Fidelity Gas Company in its operations in 1936 to 1938 was in compliance with paragraphs 3 and 5.

The appellants argue that the promptness with which Fidelity commenced the Warren well in Unit 5, while not required under the agreement, nevertheless indicates Fidelity's construction of its terms. The N. P. No. 1 well had shows of oil from two horizons and produced some oil. (Tr. 543-544) Oil was encountered in the Smith No. 1 well. There was testing, swabbing and pumping tests to ascertain if the production was commercial until July or August, 1938. (Tr. 545) The oil was of low grade, about 32 gravity and there was no market for it. (Tr. 546) It is understandable that Fidelity not knowing if the N. P. No. 1 well would prove commercial proceeded to comply with paragraph 5 by drilling the Warren well within Units 2, 3, 4 or 5. This was a prudent precaution since there was a period of uncertainty as to commercial productivity from the time the N. P. No. 1 well was equipped for pumping on October 10, 1936 (Tr. 543) until 1938 when testing was completed and it was determined that the production was not commercial.

(3) Paragraph 4 of the Fidelity Operating Agreement is not ambiguous, and rules of construction proposed by appellants are not applicable.

Appellants' pleadings, proof and brief fail to indicate wherein the ambiguity occurs. The brief of appellants merely assumes that there is ambiguity. True, no automatic termination clause was included in paragraph 4, as appellants would now like to insert. However, this agreement must stand as written and new provisions cannot be read into it under the guise of ambiguity. Since this is true the argument about rules of interpretation is of little value. However, brief references will be made to those discussed in appellants' brief.

(4) Reply to appellants' argument that contracts are interpreted against the scrivener.

Appellants' brief refers to a number of authorities for the "scrivener rule", which we will not consider in detail, in view of section 13-720, R.C.M. 1947, which limits its applicability to cases of uncertainty. It provides:

"In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist."

There is no uncertainty in paragraph 4 of the Fidelity Operating Agreement. (For further discussion see pages 71, 72, *infra*).

(5) Reply to appellants' argument that oil and gas leases are to be construed against the lessee and forfeiture thereof is favored.

The argument for the strict rule of forfeiture and interpretation is based on the false assumption that the Fidelity Operating Agreement is an oil and gas lease.

This is an operating agreement for exploration and development of the deeper sands in the Cedar Creek Anticline, including

acreage in which appellants have working interests. They are not landowner lessors as in the case of the ordinary oil and gas lessor. The terms of this agreement are to be construed as an ordinary contract. The rule against forfeiture is applicable; not the exception applied in favor of lessors in oil and gas leases. These statements are all substantiated by the opinion in *Cedar Creek Oil & Gas Co. v. Archer*, 112 Mont. 477, 481, 483, 117 P. (2d) 265 (1941).

Under the Fidelity Operating Agreement appellants subjected "all of the rights, interest and estate owned . . . under the lease, permits and agreements" on described lands. It follows that appellants are not in the position of landowner lessors considered in the *McDaniel* and other cases cited by appellants. Here we have a situation like that considered in the *Cedar Creek* case. After pointing out that there was no little controversy as to whether the operating agreement under consideration should be legally classified "as an operating agreement or a sublease" the court concluded:

"We are furthermore of the opinion that irrespective of how the drilling agreement may be classified, its terms must be applied in accordance with the general rules and the laws relating to ordinary contracts."

It was argued as here that the court should apply the rule of forfeiture strictly against the lessee as in the case of an ordinary oil and gas lease. In rejecting the argument the court said:

"It logically follows that, in our opinion, the trial court was in error where, in its findings of fact, the plaintiff was given the status of a landowner lessor and as one entitled to the benefit of the exception to the general rule relating to forfeiture as applied in oil and gas leases in favor of the lessor, which is discussed at length in the case of *Solberg v. Sunburst Oil & Gas Co.*, 76 Mont. 254, 246 Pac. 168, and a number of other cases decided by this court, in which the rule referred to was mentioned and applied. (See *Severson*

v. Barstow, 103 Mont. 526, 63 Pac. (2d) 1022; Berthelote v. Loy Oil Co., 95 Mont. 434, 28 Pac. (2d) 187; Abell v. Bishop, 86 Mont. 478, 284 Pac. 525; McDaniel v. Hager-Stevenson Oil Co., 75 Mont. 356, 243 Pac. 582)."

It is worthy of note that the court referred to the decisions in Solberg, Abell and McDaniel cases, relied on by these appellants, as being inapplicable to the cancellation and forfeiture of an operating agreement.

Another decision which held an agreement somewhat similar to the Fidelity Operating Agreement to be an operating agreement is *Aronow v. Hill*, 87 Mont. 153, 157, 286 Pac. 140 (1930). It is of special interest since it involved an agreement between a permittee and an oil company to prospect the property in accordance with the requirements of the United States, pay rentals and royalties due the government and divide the oil and gas as specified. Some of these appellants have operating agreements with permittees of government land.

6.

The court's finding and conclusion that appellees have not abandoned their rights under the Fidelity Agreement are strongly supported by the evidence.

The appellants ask this Court to set aside the trial court's finding (Finding XXII, Tr. 196), that the appellees did not abandon their rights under the Fidelity Operating Agreement. This they do despite Rule 52(a), which they recognize as existing, and then acknowledge that: "There is sharp conflict in the version these witnesses give of the conversations . . ." (Brief, 73) That the trial court carefully considered the evidence before adopting Finding of Fact XXII is clear from the section devoted to the question in the Memorandum, (Tr. 177-178) part of which reads:

“However, from a review of the decisions on abandonment, it is clear that intent to abandon must be shown before abandonment can be found. In this case while there is contradicted evidence that statements were made by officials of defendants Fidelity Gas Company and Montana-Dakota Utilities Company to the effect that those companies were through with deep drilling on the Cedar Creek Anticline, such evidence was unconvincing. Furthermore, there is uncontradicted evidence that all during the time when the abandonment is alleged to have taken place, Fidelity Gas Company was negotiating with various companies for the development of the anticline. These negotiations, established not only by the testimony of officials of defendant Fidelity Gas Company, but also by testimony of disinterested employees of the concerns with whom the negotiations were had, completely negates any intent on the part of Fidelity Gas Company to abandon their agreements.”

Seldom will a case be found where the following words of caution given by this Court in *Hunter Douglas Corp. v. Lando Products*, 235 F. 2d 631, (1956) apply so aptly:

“Strong almost to the point of vehemence is the expression ‘clearly erroneous’. An appellate court should bear this in mind when it applies Rule 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A., which provides that “In all actions tried upon the facts without a jury . . . findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

“Too often appellate courts give only lip-service to the rule that, ‘having seen and heard the witnesses, the trial judge is in a better position than an appellate court to pass upon the facts.’ Too often reviewing tribunals are tempted to substitute their own fact-judgments for those of the courts of first instance.

“This is a pit into which this Court, with more or less success, has always endeavored not to fall.”

Well might the argument be concluded at this point resting

on the admitted fact that the trial court, after hearing the conflicting evidence, found contrary to appellants' contentions. However, the record clearly sustains the correctness of the court's finding and reference thereto will be made.

(1) Facts concerning abandonment question.

Appellants admit having the burden of proving that Fidelity abandoned the Fidelity Operating Agreements. They argue that abandonment took place in 1938. This is based on the testimony of Wight, Jirik and Seivers. (Brief, 73-80)

Wight, who has an admitted interest in the profits accruing to Cedar Creek, Haney and Smith (Exhibits 17, 18, 19) and indirect interests in the other causes of action, assumed the principal burden of this phase of the evidence. (Tr. 308-312) On his deposition he testified to one trip to Minneapolis early in 1937; that he was in R. M. Heskett's office on that trip three or four times; and Heskett told him they were through drilling. (Tr. 345) Wight also testified on deposition that on one of those occasions George Norbeck was present and on another B. E. Terry accompanied him. (Tr. 340)

At the trial he did not remember that anyone was present except Heskett and he. (Tr. 339-340) On cross-examination he admitted that Norbeck and Terry were present (Tr. 340-341), and excused his shift in testimony between deposition and trial by explaining that before his deposition he had been going through records to refresh his memory. (Tr. 341) Wight believes Norbeck and Terry are deceased. (Tr. 341)

At the trial he remembered having talked to Heskett not only early in 1937, as testified at the time of deposition, but in the fall of 1937 and the spring of 1938. (Tr. 342) When confronted with his deposition and his failure to mention but one visit early in 1937, he excused himself by saying that he

had refreshed his memory from old files since the deposition. (Tr. 346-347) Let us see what Wight came up with to so clearly refresh his memory, that he visited with Heskett on two or more occasions than he could remember in 1953, when his deposition was taken: Two cancelled checks, one dated April 8, 1938 to the Nicollet Hotel and another to the Powhatan Hotel of Washington, D.C., August 13, 1937. (Exhibts 22, 23) (Tr. 350-352) These two checks lighted up some recess of Mr. Wight's memory on the important question of abandonment, which was totally dark at the time of the deposition. This evidence recalls the occasion of the witness who testified that he saw an elephant climb a telephone pole and to prove it, offered the telephone pole in evidence.

Witness, John Wight, has a vital interest under agreements to share in the profits if this action is successful. (Ex. 17, 18, 19) His very direct interest is apparent to all who read the record. In fact, he is the only one who will lose if the suit is unsuccessful, for it is he who pays the costs and attorneys fees and saves the contracting parties harmless. In the Cedar Creek profit-sharing agreement with Wight, (Exhibit 17), it is recited that Wight "believes he does possess sufficient evidence, knowledge and facts to enable said action to be successfully prosecuted and terminated." The trial court not only had the benefit of hearing the testimony but in addition was able to observe the demeanor of the witness as he attempted to explain discrepancies in testimony given on deposition and at trial.

Jirik, at the trial testified to a short visit with Heskett late in 1937; that he saw Smith the same day and was told by each that Fidelity stockholders were complaining about spending so much money, and they were through drilling. (Tr. 415) He also testified to two other conversations with Smith. Although considerable effort was made to have him fix the dates he never

got closer than late in 1937, sometime after the first of the year 1938, and again toward the end of February, 1938. Seivers was present at the last visit. (Tr. 440) It appears that when his deposition was taken in Billings (at the same time as the Wight deposition) Jirik, like Wight, recalled but one conversation in 1937, but could not give the month. (Tr. 441-442) The trial court undoubtedly considered the coincidence that the memory of each would become so much clearer at trial than on the deposition.

Mr. Jirik apparently had no cancelled checks, but he brought a corroborating witness, George H. Seivers, secretary and treasurer of Cedar Creek Oil and Gas Company. (Tr. 452-454) It is safe to say that Mr. Seivers' testimony was refuted in every particular by his own deposition. At the trial he testified about being present with Jirik and Smith in 1938, shortly after he became secretary-treasurer of Cedar Creek, when Smith said Fidelity had abandoned drilling. (Tr. 452) In his deposition he said that he had no conversations about deep drilling for oil. (Tr. 463-464) In his deposition he said he became secretary and treasurer in 1948. (Tr. 459) At the conclusion of redirect examination counsel was given permission to recall Mr. Seivers as to the date he became secretary-treasurer. (Tr. 472) Mr. Seivers was not recalled.

Heskett and Smith denied having made the statements concerning abandonment of the Fidelity Operating Agreements. (Tr. 626, 567, 569, 570) Their testimony is supported by facts much more concrete than cancelled checks. Exhibit 12 is a letter dated November 1, 1937, from Cecil W. Smith to John Wight giving a report on production from N. P. No. 1 and Smith No. 1 wells. The letter concluded: "We expect, as soon as conditions permit, to deepen the #1 N. P. No. 1 well as it is felt that possibilities for additional lower producing zones are good."

In referring to #3 Smith No. 1 well, the letter stated: "Pumping was begun on May 22, 1937, and has continued since."

This letter covered the period of two of Wight's alleged visits—early in 1937 and August 1937. It was written about the time Jirik testified he called on Heskett and Smith. Here is recorded evidence by Mr. Smith that he still had hopes of good production at a lower depth to which drilling would be carried on in N. P. No. 1. Is it reasonable that he was, at the same time, telling Wight or Jirik that Fidelity was all through? The letter refutes any intention to abandon.

Herman F. Davies of the California Exploration Company testified as to frequent visits with Heskett and Smith from 1936 until late in 1938, negotiating on behalf of The California Company for the interest in the Fidelity Operating Agreements; and that in October and November, 1938, geophysical seismic work was done in Cedar Creek Anticline by his company. Negotiations were concluded by letter of January 9, 1939, from The California Company to Mr. Heskett. (Ex. 42, Tr. 510-511) It is not reasonable that competent businessmen would be attempting to agree to deliver an interest in oil and gas rights they were then abandoning or had abandoned.

Subsequently in an agreement dated November 27, 1940, Fidelity gave The Carter Oil Company the right to acquire an interest in the Fidelity Operating Agreement covering Gas Units 1 to 7, inclusive. (Ex. 44) This negatives any intent to abandon. The same is true of the agreements with Husky Refining Company, Exhibits 46, 47 and 48, and the Shell agreement, Exhibit 5.

There has been no showing of act and intent of Fidelity to abandon Fidelity Operating Agreements. This is necessary to meet requirements laid down by the Montana Supreme Court from an early date through 1938, when it decided *Irion v. Hyde*, 107 Mont. 84, 91, 81 P. (2d) 353.

(2) The law concerning abandonment.

Having discussed the facts on this phase of the case, appellees feel that the distinction between "abandonment" and "forfeiture" should be pointed out. As indicated in the trial court's memorandum (Tr. 177) courts have frequently used these terms "inexactly and interchangeably" in deciding oil and gas lease cases. In the field involving oil and gas leases we find the greatest laxity in the use of the term "abandonment" when "forfeiture" is intended. The subject is well covered by Professor Merrill in his work, "Covenants Implied in Oil and Gas Leases", second edition, pp. 28-34.

The Oklahoma case of *Berton v. Coss*, 280 Pac. 1093, 139 Okl. 42 (1929) is cited in appellants' brief page 83. As will be seen this decision no longer expresses the view of the Oklahoma court.

In the *Berton case*, lessee brought an action to establish title to an oil and gas lease. The lease was dated in 1920 for a primary term of 14 months and required a yearly payment of \$300.00 for each well where gas only was found. A gas well was drilled and gas was produced for a short time. This well began producing water with the gas. There was an attempt made to pull the casing, but it was never completed. There was some evidence that lessee intended to drill a second well, but he never did. The court held that the lease was valid in the inception, but there was a breach of implied covenants to properly develop the lease premises, which justified the court in holding that the lease was no longer valid. The quoted statement on abandonment was made in the opinion. However, the decision actually rested on breach of implied covenants.

By 1943 the Oklahoma court found its decisions in a hopeless state of confusion. No distinction had been made between forfeiture and abandonment. In a "confession of confusion" the

opinion in *Doss Oil Royalty Co. v. Texas Co.*, 192 Okl. 359, 137 P. (2d) 934, 937, 938, (1943) was written. Former decisions were reviewed including *Berton v. Coss*. With reference to the *Berton* case it was pointed out that the court mistakenly referred to abandonment when it was actually considering forfeiture under an implied covenant. It follows from what is said in the *Doss* opinion that the *Berton* decision no longer stands as authority for the abandonment theory therein erroneously announced.

In *Hall v. Augur*, 82 Cal. A. 594, 256 P. 232, 235 (1927) the community lease specifically provided for the erection of a derrick in 30 days and commencement of a well 30 days thereafter. The lessee never did anything except erect a derrick. The court in holding the lease invalid referred to forfeiture and abandonment indiscriminately, and finally said: "The plaintiff had a right to forfeiture for conditions broken . . ."

The limits of this brief will not permit a discussion of the general principles governing abandonment established by the decisions of the Supreme Court of Montana. Reference will be made to them and consideration given to the case of *Hermon Hanson Oil Syndicate v. Bentz*, 77 N.D. 20, 40 N.W. (2d) 304, 306, 308 (1949), in the appendix.

7.

Paragraph 4 of the Fidelity Operating Agreement is not ambiguous and parol evidence concerning its provisions was properly excluded.

Specification of Error 14 is based on the court's refusal to permit John Wight to testify concerning discussions had prior to the execution of the Fidelity Operating Agreement, as to what would happen in the event the test well was not successful.

(Brief, 17-18) The appellants' argument rests on the uncertain and shaky premise that Paragraph 4, to quote from their brief, was "not so clear as to the time in which additional wells were to be drilled", (p. 18) and; "If the Trial Court is correct in finding there was ambiguity as to the time the option must be exercised . . ." (p. 67). As will be seen the trial court found there was no ambiguity.

In referring to the interpretation of paragraph 4, the trial court said in its memorandum opinion, "the court remains of the opinion that Paragraph 4 is not ambiguous, needs no explanation by way of oral evidence and that such evidence was properly excluded." Continuing, the court also found "The meaning of Paragraph 4 is clear when read in the light of the provision of the contract as a whole." (Tr. 172) And finally concluded with this statement, "In short, Paragraph 4 granted to Fidelity Gas Company the option to conduct further drilling operations, in the event the first test well was unsuccessful and further provided that the option so granted must be exercised within the time after the completion of the unsuccessful test well that good oil field practice in a wildcat area would require." (Tr. 173)

From the appellants' brief, and specifications of error this court would be led to believe, that the ruling had to do with only three questions and answers set forth under Specification of Error 14. Actually these were only preliminary to offers of proof. (Tr. 293, 364) The offers being quite similar the first is quoted:

"The plaintiffs offer to prove through the witness on the stand that at the time the contract was negotiated, and during the discussions at the conference at Billings referred to by this witness, the question of the effect of unsuccessful testing or drilling program was discussed, and reference was made by one of the rep-

representatives of the Fidelity Gas Company to Paragraph 4 of the deep test agreement, and it was stated by the representative, and generally agreed that in the event the testing program was not successful, and in the event the testing program was terminated, that there would then be remaining in Fidelity Gas no rights under the contract, and that Section 4 was referred to as the section which had that effect." (Tr. 293)

The offer was refused after appellees' objection that: "it is incompetent, irrelevant and immaterial; there is no issue in this case, no pleading to reform this agreement, and that the witness is now attempting to vary the terms of the written instrument by conversations that took place during negotiations, no proper foundation laid." (Tr. 291, 293)

What appellants were attempting is revealed by counsels' statement to the court:

"So the record will be clear, I would state that the purpose of this question and the testimony we had hoped to elicit is that at the time the contract was under negotiation, and in the study of the various provisions, the question came up as to what would happen if the deep test weren't successful, and the parties, both sides, said that would be the end of the contract. I don't believe that varies any term of the contract. That was the testimony we had hoped to elicit on this particular question." (Tr. 361-362)

Appellants seek to justify their position by asserting that Paragraph 4 is ambiguous and therefore falls within one of the exceptions as to the parol evidence rule. This rule and its exceptions, as codified by section 93-401-13, R.C.M. 1947, provides:

"When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:

- "1. Where a mistake or imperfection of the writing is put in issue by the pleadings.
- "2. Where the validity of the agreement is the fact in dispute.

"But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in section 93-401-17, or to explain an extrinsic ambiguity, or to establish illegality or fraud . . ."

It also is provided by section 13-607:

"The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."

Appellants did not plead ambiguity in their reply. No effort to point out the ambiguity was made at the trial or in their brief. On the contrary, they content themselves with the bald, unexplained assertion that Paragraph 4 is ambiguous. Appellees feel this situation is covered by the rule stated in 17 C.J.S. Contracts, § 535b, p. 1159:

"Where the contract is ambiguous, the pleader may and must remove the ambiguity by averring a definite meaning or construction of the ambiguous language . . . If a party wishes to introduce evidence explaining a written contract, he must plead the ambiguity making such testimony necessary."

The quoted principle is applicable to cases arising under section 93-401-13 R.C.M. 1947, adopted from California, where the enactment exists as section 1856, Code of Civil Procedure. In *Hotchkiss v. Nelson R. Thomas Agency, Inc.*, 96 Cal. App. (2d) 154, 214 P. (2d) 568, 570 (1950), the court, in speaking of the ambiguity exception to the parol evidence rule, said:

"The case does not fall within the exceptions of section 1856 of the Code of Civil Procedure since the ambiguity was not put in issue by the pleadings nor was the validity of the contracts in dispute."

It is worthy of note that in *Brown v. Homestake Exploration Co.*, 98 Mont. 305, 323, 331, 39 Pac. (2d) 168 (1934) cited by appellants the complaint alleged the oral negotiations and agreements and the interpretation of the agreement for which he contended. Clearly, in the absence of specific allegations pointing to the ambiguity, appellants are precluded from raising the question.

We have heretofore shown that the obligation created by Paragraph 4 of the Fidelity Operating Agreement is clear and unambiguous; that the life of the agreement coincides with that of the underlying base oil and gas leases; and that the time and place for drilling additional test wells if the first proved uncommercial are matters governed by Fidelity's good faith judgment of good oil field practice. The trial court properly held Wight's offered testimony inadmissible because it constitutes an attempt to read a termination provision into a complete, integrated writing.

Appellants have stressed *Brown v. Homestake Exploration Co.*, supra, and stated that "the facts were most similar to those in instant case." (Brief, 68) Examination of the *Brown* case reveals that the only similarity springs from the fact that the Montana Supreme Court was dealing with an agreement for oil exploration. There the similarity ends. The agreement before the court in the *Brown* case obligated the defendant to drill wells "to such number and extent as said premises will admit of." The court sanctioned the admission of testimony to explain the number of wells contemplated by the quoted provision. In so doing, the Supreme Court of Montana did not add a provision to the agreement but merely permitted explanation of an existing provision in order to gauge the sufficiency of the defendant's performance. Obviously, this is a vastly different situation than is presented in this case. Here the proffered

testimony seeks to add a parol provision for automatic termination. Undoubtedly, the *Brown* case represents a logical application of the parol evidence rule. However, it cannot be distorted and applied in the manner appellants urge.

The applicable rule is appropriately summarized by the following language from the opinion of the Supreme Court of Montana in *McDaniel v. Hager-Stevenson Oil Co.*, 75 Mont. 356, 361, 243 Pac. 582 (1926):

“A contract may not be changed or revised under the guise of interpretation. Where a contract is plain and clear in its terms, neither interpretation nor construction is permissible. (Citing *Ming v. Pratt*, 22 Mont. 262, 56 Pac. 279 and another Montana decision) When the language employed by the parties ‘is free from ambiguity or uncertainty, it is beyond the power of the court to enlarge or restrict its application or meaning’ (citation). And when the terms of a contract are plain and unambiguous, resort may not be had to extrinsic circumstances under the pretense of determining its meaning.”

It is evident that the trial court did not err in ruling that Wight's offered testimony was inadmissible.

8.

Appellees are not estopped from claiming under the Fidelity Operating Agreements.

In support of their claim of estoppel, appellants rely entirely on statements of abandonment claimed to have been made by Fidelity officials to appellants in 1937 and 1938.

The trial court found that appellees did not abandon their rights under the Fidelity Operating Agreement (Finding XXII, Tr. 196) and stated that the evidence as to these statements “was unconvincing.” (Tr. 177)

In just this situation, *Fiers v. Jacobson*, 123 Mont. 242, 211 P. 2d 968, 972 (1949) said:

"In *Davis v. Davis*, 26 Cal. 23, 85 Am. Dec. 157, at page 168, the Supreme Court of California said: 'We may say in respect to parol evidence of the declarations and admissions of persons made long anterior to the trial, upon which an estoppel in pais may be sought to be founded, that it cannot be too carefully scrutinized by courts and juries. In all cases, it is the most dangerous species of evidence that can be admitted in a court of justice, and the most liable to abuse. In most cases, it is impossible, however honest the witness may be, for him to give the exact words in which the declaration or admission was made. Sometimes even the transposition of the words of a party may give a meaning entirely different from that which was intended to be conveyed. The slightest mistake or failure of recollection may totally alter the effect of the declaration or admission. And more than this, it is most unsatisfactory evidence on account of the facility with which it may be fabricated, and the impossibility, generally, of contradicting it when false.'"

CONCLUSION

The trial court after hearing the witnesses and in the exercise of sound discretion entered judgment for the appellees. It is respectfully submitted that the judgment is supported by the court's findings in favor of the appellees on their defenses of laches, estoppel and waiver; the finding that appellants gave no notice of default under express or implied covenants to drill or develop; and the uncontraverted evidence that drilling and development were carried on by appellees under the Fidelity Operating Agreement in the exercise of good faith discretion as to good oil field practice.

Respectfully submitted,

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GENERAL PRINCIPLES OF ABANDONMENT

The general principles of "abandonment" have been frequently recognized in Montana through decisions involving mining claims and water rights. Some of those found in the decisions are:

- a. The intent to abandon is the first and paramount requirement.
- b. Abandonment must be made by the owner, without being pressed by any duty, necessity or utility to himself.
- c. Mere lapse of time during which there is nonuser is not sufficient.
- d. Abandonment must be made by the owner because he desires no longer to possess the same.

Irion v. Hyde

107 Mont. 84, 91, 81 Pac. (2d) 353 (1938):

Conway v. Fabian

108 Mont. 287, 306, 89 Pac. (2d) 1022
(1939)

Moore v. Sherman

52 Mont. 542, 545, 159 Pac. 966 (1916):

Featherman v. Hennessy

42 Mont. 535, 540, 113 Pac. 751 (1911).

Although many cases might be cited applying to development of oil and gas lands the distinction between forfeiture and abandonment, reference is made to only one lately decided by the North Dakota Supreme Court. It will indicate the application of the foregoing principles to a fact situation somewhat similar to this case. *Hermon Hanson Oil Syndicate v. Bentz*, 77 N.D. 20, 40 N.W. (2d) 304, 306, 308 (1949), was decided by the Supreme Court of North Dakota on October 31, 1949. In this case the Oil Syndicate, plaintiff, brought an action against Bentz, subsequent lessee, and the owners of the fee, successors in interest to the lessor of the Oil Syndicate, to quiet title to land which the Syndicate

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held under a lease dated November 10, 1926. The Syndicate lease provided that it was taken as a part of a community lease and the facts disclosed that identical leases involving the community feature were obtained on 96,000 acres of land. The lease provided that "unless drilling shall begin on some part of this community lease within the specified five-year period then and in that case each one of the leases comprising this community lease shall become null and void."

The defendant's first contention was that the plaintiff abandoned its lease prior to the execution of the subsequent lease to Bentz. The records disclose that the plaintiff began drilling a well on a tract of land covered by the community lease other than the lease involved in the action in 1928. Actual drilling operations were suspended in the fall of 1933. The plaintiff had erected on the building site an office, two bunkhouses, a cook house and derrick, installed drilling machinery and purchased casing at an expense of over \$29,000.00. The main well was drilled to a depth of 1840 feet. When drilling was suspended, the derrick was not removed, neither was the casing withdrawn from the well. The power plant consisting of a diesel unit was moved to a nearby farm and stored. The court found that the drilling equipment could be put into operation again within twenty-four hours and that suspension of drilling in 1932 (sic) was due to depletion of funds and that the plaintiff later undertook other operations with a view to procuring money with which to complete the well. These operations included the conduct of strip coal mining operations on land covered by the community lease in 1937 and 1939, experiments with extracting gold from gravel and, from time to time, making efforts to procure financing sufficient to enable the plaintiff to complete the well and continue exploration operations. In 1940, an application was made to the Securities Stock Exchange Commission

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for permission to sell \$300,000 worth of stock. During the war, the War Production Board sought to have the plaintiff scrap his equipment and pull up the casing, which the plaintiff refused to do and advised the Board the plaintiff intended to continue drilling. In 1945, a tentative contract was made with a driller which did not produce results. The plaintiff from time to time executed waivers of priority in favor of mortgagors to enable lessor to secure mortgages. The court also found that during World War II it was impossible for companies like the plaintiff to procure pipe for casing or equipment to carry on operations; that since the war the plaintiff had leased under the community lease approximately 10,000 acres in addition to the original 96,000; and that it had also leased approximately 10,000 acres from the state of North Dakota. Two officers of the plaintiff corporation testified that it was the intention of the corporation to continue operations and to drill the well to a sufficient depth to either be a producing well or a dry hole and to that end a tentative agreement had been reached with a drilling concern to proceed with the work.

On the basis of the above facts, the court found that there had been no abandonment of the property by the plaintiff, and stated:

“The abandonment of property or an interest therein implies a voluntary relinquishment thereof. Intent is an essential element of abandonment. We have followed this general rule with respect to the rights of a vendee under a land purchase contract. (Citing case), and with respect to homestead rights, *Larson v. Cole*, N.D., 33 N.W. 2d 325; *Grotberg v. First Nat. Bank*, 54 N.D. 548, 210 N.W. 21. The same general rule is applicable where a lessor seeks to terminate an oil and gas lease on the ground that the lessee has abandoned it. Unless it appears either by direct evidence or preponderant circumstances that the lessee intended to abandon his lease, the courts will not declare it termi-

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nated on that ground. Intention of the lessee to abandon an oil lease is a requisite. (Citing cases) In Oklahoma a long line of cases emphasize the necessity of intent to relinquish as a basis for abandonment and in recent decisions a showing of intention to abandon accompanied by physical relinquishment is required. (Citing cases)

The *Bentz* case also discusses forfeiture and the necessity for notice.

Reply Brief of Appellants

United States Court of Appeals

For the Ninth Circuit

No. 15293

CEDAR CREEK OIL AND GAS COMPANY, a corporation,
INTERNATIONAL TRUST COMPANY, a corporation,
H. C. SMITH, SUSAN M. WIGHT and W. B. HANEY,

Appellants,

vs.

FIDELITY GAS COMPANY, a corporation, MONTANA-
DAKOTA UTILITIES COMPANY, a corporation, and
SHELL OIL COMPANY, a corporation,

Appellees

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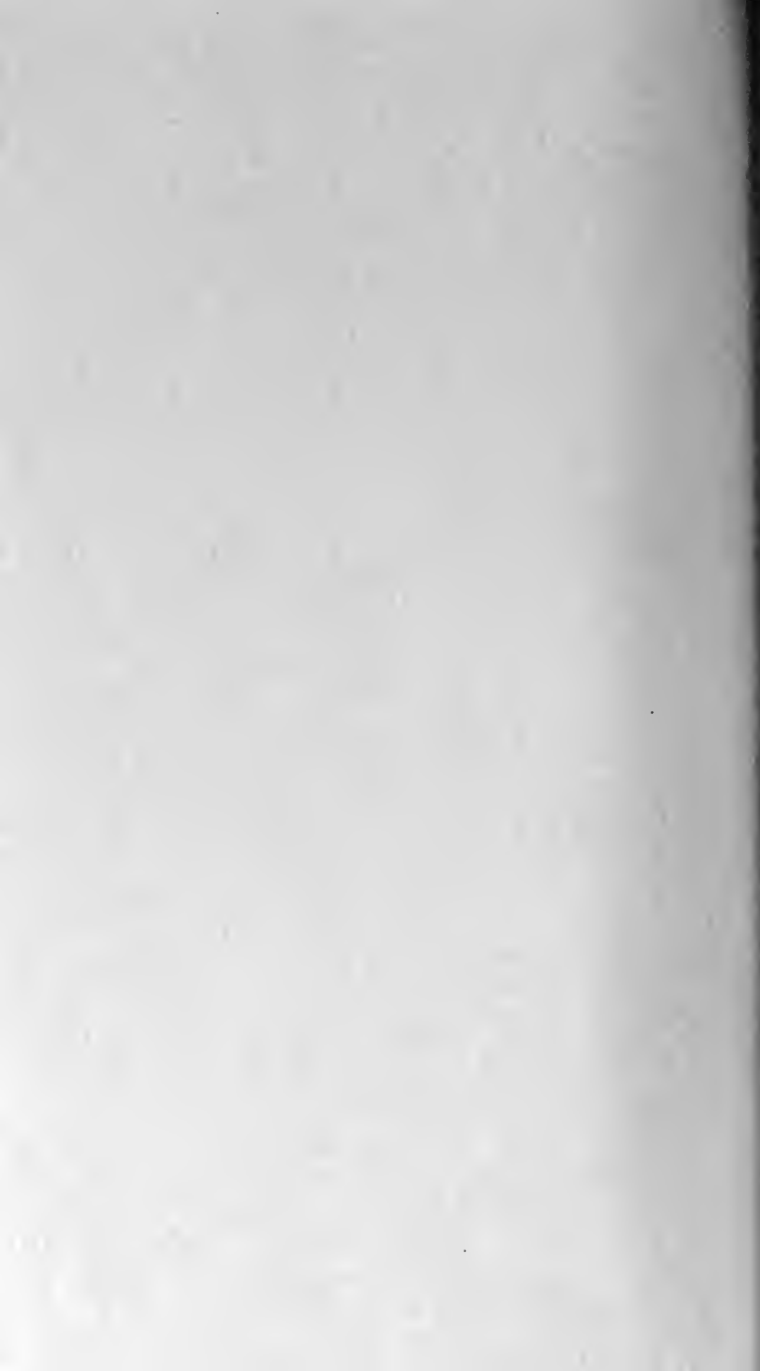
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Except for two propositions, appellants feel their original brief adequately meets all of the argument contained in the brief of the appellees.

In view of the extended argument and the citation of many cases on the question of laches, a further discussion of that subject seems warranted by way of reply. In addition, there is argument on the part of the appellees that the Fidelity Agreement is not a lease in opposition to the specific findings of the Court. This reply brief will be limited to a discussion of these two subject.

LACHES

We adopt as a correct statement of the law, the quotation appearing in appellees' brief at page 28 from *Potash Company of America v. International Min. & C. Corporation*, 213 Fed. (2d) 153, 154, 10th Circuit, 1954:

"To constitute laches, two elements must exist; first, inexcusable delay in instituting suit and second, prejudice resulting to the defendant from such delay."

In our opening brief, our emphasis was on the lack of the first of the two elements, that is, inexcusable delay in instituting suit. The letter which constituted the notice that appellees, or any of them, were claiming under the Fidelity Agreements was mailed on April 27, 1951. This suit was commenced against the appellees Fidelity Gas Company and Montana-Dakota Utilities Company on December 3, 1952. The amended complaint was filed on February 2, 1953. Thus, not more than 19 months elapsed from the receipt of the letter of April 27, 1951, by any of the ap-

pellants and the institution of this suit. We have examined each of the cases cited by appellees on the question of laches. They fall generally into two categories. One, cases in which minerals are involved, and two, cases in which the actions are ones to set aside contracts or to establish involuntary trusts. In both these categories, the doctrine of laches is applied most harshly. We feel the period considered in each of these cases might be illuminating to the Court to illustrate the standard applied in each case as to the required delay to sustain a finding of laches. All of these cases fall within the exception to the rule requiring the application of the applicable statute of limitations by way of analogy to measure the delay required to establish the first element of laches.

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Buchler v. Black, 226 Fed. 703	3
Hunt v. Pick, 240 Fed. (2d) 782, 786	2 yrs. 8 mos.
Union Oil & Gas Company v. Cross, 220 Kentucky, 271, 295 S. W. 172	6 yrs. 6 mos.
Walker-Lucas-Hudson Oil Company v. Hudson, 168 Ark. 1098, 272 S.W. 836	2
Dela Lamar Mines of Montana v. McKay, 104 Fed. (2d) 271	19 mos.
Brown v. Privette, 109 Okla. 1, 234 Pac. 577	18 mos.
Davis v. Godwin Barkley Company, 120 Okla. 274, 521 Pac. 1042	18 mos.
Robert Hind Limited v. Silva, 75 Fed. (2d) 74, Where Statute of Limitations Are 2 Years	2 yrs. 6 mos.

In the case of *Robert Hind Limited v. Silva*, 75 Fed. (2d) 74, cited the applicable statute of limitations was two years, but the Court held that delay of two years six months was not sufficient to constitute laches.

Able counsel has undoubtedly combed the reports for the cases where the shortest period has been held to be sufficient to support a finding of laches. Under the great majority of these cases, the Court would be required to hold in this case there was no delay sufficient to fulfill the first requirement of the rule stated in the Potash case.

In the case of *Brown v. Privette*, the action was for rescission and oil was discovered during the delay on the very lands in litigation. The same is true of *Davis v. Godwin Barkley Company*. In all of the cases where the very short period was held to constitute laches, the action was one to set aside a lease or other agreement. Examination of the cases indicates that the doctrine is more frequently applied to short periods in that class of cases than in others, as indicated by the language in *Robert Hind Limited v. Silva*, 75 Fed. (2d) 74 where this Court, considering a case where the suit was to cancel a release given for personal injuries, said:

“It is fundamental that ‘a right to rescind must be exercised promptly on discovery of the facts in which it arises, the requisite diligence being governed by the circumstances of the particular case’. 13 C. J. 615, 616.”

but this Court held there was there no laches.

In *Buchler v. Black, supra*, the action was to set aside a fraudulent sale. The Court said:

“The authorities that point to the necessity of the exercise of the right of rescinding or avoiding a contract or transaction, as soon as it may reasonably be done after the party with whom the right is optional is aware of the facts which give him that option are numerous and well collected in the brief of appellees’ counsel.”

This is not an action for rescission or to set aside the agreement as fraudulent. It does not fall within any of the cases cited by appellees where comparable delays have been held to be sufficient to constitute laches.

The time table of drilling shows no prejudice and no undue delay. The first drilling by Shell was in the Pine Unit, entirely outside the units included within the Fidelity Agreements. There is no connection between drilling in that unit and drilling in Units 1 through 8(b). The first drilling in any of the units within the Fidelity Agreement was commenced on March 3, 1952, (Def. Ex. 60) more than 10 months after the letter of April 27, 1951. That well, as has been pointed out, was more than 30 miles from the lands of appellants.

The second well on the unitized area was not started until October 9, 1952, (Ex. 60) which was two months before this suit was filed. This well was in the adjoining section south of the first well. Shell was moving away from appellants’ lands, not toward them, when suit was filed.

This was all the drilling that had occurred on December 4th, when the original complaint was filed. An examination of the amended complaint and the record will show that a considerable amount of time would be required in searching titles and in the preparation of the complaint. The action was filed nine months after the first drilling of any land in the area covered by the Fidelity Agreement.

If any significance can be attached to the drilling of the five wells in the Pine Unit which had commenced at the time the case was begun, we point out that all five of the wells are within a radius of not to exceed one mile. After the discovery well the other wells were simply development wells. All of them are at least 25 miles from appellants' lands.

Compare these facts with any of the cases cited by appellees on the delay sufficient to constitute laches in suits involving oil lands, and it will be seen this case does not come even close to the facts in the cases cited. In every one of those cases the drilling had been on the lands involved, or at least in the immediate vicinity. Large sums had been spent on the lands themselves or on lands adjacent to them. In each case it was clear that the drilling would not have been performed if it were not for the silence of the land owner.

We call the Court's attention to its exhaustive discussion of the doctrine as it relates to the passage of time in *Gillons v. Shell Oil Company, supra*, where this Court in discussing laches quotes and cites from cases, characterize

the element of delay as: "Stale demands." "Neglect." "Staleness of the claim." "Antiquated demands." "Gross laches." "Slept upon his rights unreasonably long."

There are not here present facts taking this case out of the rule stated by this Court in *City of Roswell v. Mountain States Telephone & Telegraph Company*, 78 Fed. (2d) 379 quoted in appellants' brief.

Once its agreement with Montana-Dakota Utilities was consummated, Shell was bound to perform no matter what appellants did or did not do. The drilling under way when this action was instituted was performance under that agreement.

It was performance to which Shell was pledged under its contract. It was required by the contract—it was not induced by anything appellants did or refrained from doing. Suppose appellants had started suit in 1951. Could Shell have altered its course? Could it have abrogated its contract? The questions answer themselves.

Shell could only be prejudiced if it had drilled appellants' lands or lands adjacent to them before the suit started. As pointed out above, on the date the action was filed there was no drilling on the anticline within 35 miles and new drilling both to the north and south was moving away from appellants' lands.

Compare the facts in *Union Oil & Gas Co. v. Cross*, *supra*, *Buchler v. Black*, *supra* and *Brown v. Privette*, *supra*, as typical of cases cited by appellees with the facts here. The

comparison shows the drilling in each case was on the lands in suit or on lands in close proximity to those involved.

Neither requirement of laches, undue delay nor prejudice within the requirements of *Potash Company of America v. International Min. & C. Corporation, supra*, here appears and the Court erred in holding appellants guilty of laches.

FIDELITY AGREEMENT A LEASE

Appellees' brief at page 62 contains the following statement:

"The argument for the strict rule of forfeiture and interpretation is based on the false assumption that the Fidelity Operating Agreement is an oil and gas lease."

Then follows argument that the Fidelity Agreement is an operating agreement and not a lease. Reliance is had on *Cedar Creek Oil & Gas Co. v. Archer*, 112 Mont. 477, 481, 483, 117 Pac. 265. Earlier in the brief appellees cite *Bowes v. Republic Oil Company*, 78 Mont. 134, 252 Pac. 800. Appellees thus by their brief attack the findings of the Trial Court. Finding No. XIII, (Tr. 192) reads:

"The agreements grant and sublease to defendant Fidelity Gas Company as operator, oil and gas working rights of plaintiffs in the lands hereinabove described, * * *."

Finding No. XIV is that the Fidelity Operating Agreements are options. The Court considered the effect of the Fi-

delity Agreements at length in the Memorandum. Among other things the Court says in its Memorandum:

“This language used by the parties indicates their intention to make a sublease, and the court can find nothing in the other provisions of the agreement that require the court to defeat the intention of the parties so expressed by construing the instrument as something other than a sublease.”

In the Memorandum the Court specifically rejects the argument now made in the appellees' brief that the Fidelity Agreements are not leases or subleases, and the Court concludes:

“It seems clear to the court that the Fidelity Agreements here involved are subleases and must be considered as such * * *. If the Fidelity Agreements were merely operating agreements or drilling contracts, defendants contend Fidelity would have no interest to sublease to Shell.” (Tr. 166, 167).

Appellees have not cross-appealed. What the appellees seek to do by this argument is prohibited under *Standard Accident Insurance Company v. Roberts*, CCA 8, 1942, 132 Fed. (2d) 794. They are seeking:

“. . . to change or to add to the relief accorded by the judgment which was in their favor. They can raise here such issues only by a cross-appeal.”

Since the Trial Court found the Agreements to be subleases, the rules applicable to the construction of oil and gas leases applies, and forfeiture thereof is favored and in the absence of a cross-appeal, appellees are bound by the finding of the Trial Court.

Why appellees cite the Bowes case is hard to comprehend. The Trial Court found by Finding No. XIV that the sublease was in the nature of an option. That finding puts it in exactly the same class as the lease considered in the Bowes case, and as in the Bowes case if the option were not exercised within the time contemplated, the lease died. If the Bowes' lease was dead, as appellees admit at page 43, then this lease was dead upon the failure of appellees to exercise the option contained in Paragraph 4, and as held in the Bowes case, the provision rendering it dead is "... self operative." As was said in the Bowes case, this operating agreement, within the finding of the Court, falls "... within the category of the 'unless' form of lease which terminates ipso facto on failure to exercise the option granted, and under which no affirmative action is required of the lessor."

Since the filing of the appellants' brief, the Supreme Court of the State of Montana has handed down its opinion in the case of *Schumacher v. Cole*, 14 *State Reporter* 123, ———, *Pac.* (2d) ———. The Court restated its adherence to the rule in *McDaniel v. Hager-Stevenson Oil Company*, 75 *Mont.* 356, 366, 243 *Pac.* 582; *Thomas v. Standard Development Company*, 70 *Mont.* 156, 224 *Pac.* 870; *McNamara Realty Company v. Sunburst Oil and Gas Company*, 76 *Mont.* 332, 352, 240 *Pac.* 166; *Abell v. Bishop*, 86 *Mont.* 478, 497, 284 *Pac.* 525; *Williard v. Campbell*, 91 *Mont.* 493, 504, 11 *Pac.* 782 and *Bowes v. Republic Oil Company*, 78 *Mont.* 134, 143, 252 *Pac.* 800.

The Court having found the Fidelity Agreement to be a sublease, the rules as to the construction of oil and gas leases apply. Forfeiture is favored, and all doubts must be resolved against the lessee.

The judgment of the Trial Court should be reversed with directions to enter judgment for the appellants quieting the titles of the appellees to their lands and leases insofar as they relate to the deep sands.

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Appellants' Petition for Rehearing

United States Court of Appeals

For the Ninth Circuit

No. 15,293

CEDAR CREEK OIL AND GAS COMPANY, a corporation,
INTERNATIONAL TRUST COMPANY, a corporation,
H. C. SMITH, SUSAN M. WIGHT and W. B. HANEY,

Appellants,

vs.

FIDELITY GAS COMPANY, a corporation, MONTANA-
DAKOTA UTILITIES COMPANY, a corporation, and
SHELL OIL COMPANY, a corporation,

Appellees.

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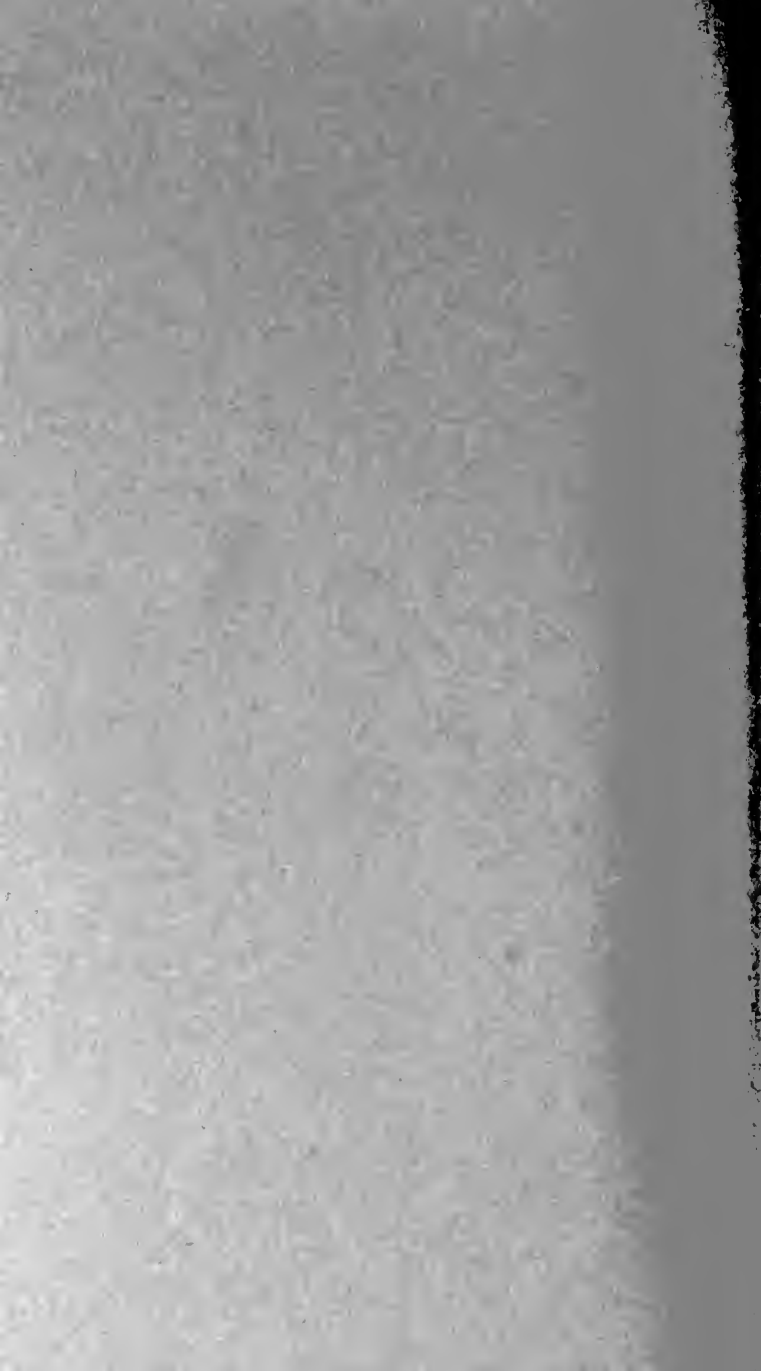
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FILED



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DAKOTA UTILITIES COMPANY, a corporation, and
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Appellees.

Appellants' Petition for Rehearing



TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT:

By its Opinion of October 22nd, 1957, the Court affirmed the judgment of the District Court of the Montana District in granting judgment for the appellees on the grounds of estoppel, laches and waiver. In justice to appellants, and before they are finally deprived of their rights, this Court is petitioned to grant a rehearing so that full consideration may be given to the following points:

(1) By affirming a finding that appellants are estopped, this Court has shifted the burden of proof from appellees, who invoked the plea of estoppel, to the appellants.

(2) The Opinion itself demonstrates that appellees failed to sustain the burden of proving the existence of all of the elements of estoppel by proof, clear, convincing and satisfactory.

(3) The Opinion itself demonstrates that the holding of the Court results from applying every presumption against appellants and for the appellees on the application of the doctrine of estoppel contrary to the law. The Opinion itself demonstrates that the holding that appellants are estopped is based on conjecture and surmise, and there is direct, positive testimony negating the existence of the elements of the estoppel.

(4) The Opinion itself demonstrates that estoppel has been applied not in the furtherance of justice, but as a sword, in an assault upon the rights of the appellants.

(5) By its Opinion the Court has extended the benefit of its holding of an estoppel to appellees, Montana-Dakota Utilities Company and Fidelity Gas Company even though the Court found that the essential elements of misrepresentation and concealment and reliance were not present so far as those appellees are concerned.

(6) The Opinion itself shows that the Court ignored the rules applicable to oil and gas leases that forfeitures are favored with the result that by its holding the Court has determined that the appellees have kept in force an unexecuted profitless oil and gas lease for a period of 17 years.

(7) The Lower Court decided the case upon the question of estoppel, laches and waiver. By its Opinion, this Court has assumed to pass on the merits of the cause.

(8) Justice requires that a rehearing be granted and that the decision of the Trial Court be reversed.

DISCUSSION

Appellants entered this case armed with a number of legal doctrines which gave to them certain most valuable advantages. Appellees pleaded an estoppel. Under that plea, appellees assumed the burden of proof under prior decisions. We thought appellees would have to prove every element of an estoppel by evidence, clear, convincing and satisfactory. Realizing that the Courts have always held that estoppels are odious and will be applied for only the most impelling reason, we were confident upon the trial

and upon the appeal that the Court would reject the plea, for we assert that appellees completely failed to carry the burden on any one of the elements.

Under the Court's Opinion, instead of the favored position granted us under the laws as it had heretofore existed, the burden was shifted to us, and we were held to be estopped. If there is any doubt as to the correctness of this statement, it is resolved by the following language of the Court which is typical of its treatment of all the issues. Bearing in mind the rule that to support an estoppel the proof must be clear and convincing, the Court, in finding reliance at page 12 of its Opinion says:

"Here, the circumstantial evidence *tending to prove* reliance as accepted by the trial court and reflected in the findings of fact summarized below, is ample."
(Emphasis supplied.)

By this Court's own words, the circumstantial proof of reliance only *tended* to prove reliance.

The burden of proving reliance was upon appellees, yet not one witness was called to present affirmative evidence of reliance. Such testimony need not have consisted only of self serving declarations, but certainly a simple direct statement by an officer of Shell would have been entitled to great weight. Absence of such a statement raises the inference that it was not made because it couldn't be. A conclusion that there was proof of reliance, clear, convincing and satisfactory, does violence to every accepted concept of the application of the doctrine of estoppel.

Under the law, as it was when this case was started, the rule was that forfeitures of oil and gas leases were favored, but in this case, every presumption was indulged against that rule and a lease under which no payment has been made, and under which no money has been expended for 17 years, is held to be effective.

The writer of this brief served for six years as a member of an Appellate Court and knows the reluctance of the Courts to grant rehearings. He earnestly submits, however, that in this case, the facts demand the granting of the relief and he is confident the Court will give to the Petition the most serious consideration.

THE DOCTRINE OF ESTOPPEL IS APPLIED ONLY TO PROMOTE THE ENDS OF JUSTICE

The first principle applicable to estoppels is that the remedy is always applied so as to promote the ends of justice. It is available only for protection and cannot be used as a weapon of assault. *Dickenson vs. Colgove*, 100 U. S. 578, 25 L. Ed. 618. The inquiry here is the same as that stated in *IXL Stores Co. vs. Success Markets*, ----- *Utah* -----, 97 Pac. (2d) 577:

“Was the change of position sufficient to warrant the application of the doctrine of equitable estoppel or would its application in the present case be more in the nature of a sword cutting off the rights of the lessor * * * ?”

The record here shows that all the agreements between appellants and appellees Montana-Dakota Utilities and

Fidelity were made under conditions that gave Montana-Dakota and Fidelity unconscionable advantage over appellants. Exhibit 36 demonstrates and confirms the testimony of H. C. Smith, Wight and others that appellants' substantial gas production has been taken for twenty-five years with no real returns to appellants. The individual appellants and officers of the corporate appellants are old men. Their investments in lands and leases have, under the kindly administration of Montana-Dakota yielded only the bitter fruit of disappointment. They know if the Court adheres to its views, none of them will live to see a single payment of royalty or anything else under the Fidelity Agreement. If it were otherwise, would they now be fighting the power of the great corporations, Shell and Montana-Dakota Utilities? Bitter experience has been their teacher. They know if they now lose, their dreams of 30 years ago will be forever dust. Truly here estoppel has become the ultimate weapon of assault.

Appellees admitted that from 1938 on, neither Montana-Dakota Utilities nor Fidelity Gas spent one cent on geophysical work, drilling or development of the lower sands. The Court did not find that either the Husky or Carter drilling 35 miles from appellants' lands was drilling under the Fidelity agreement and, of course, no such conclusion could be justified.

Are the ends of justice served by applying the doctrine of estoppel so that these leases have been kept alive for nearly 20 years without expenditure by Montana-Dakota Utilities

or Fidelity of one cent? The question answers itself. Compare *Sauder vs. Midcontinent Petroleum Company*, 292 U. S. 272, 54 S. Ct. 671.

The first principle of the doctrine requires rejection of estoppel in this cause.

THE BURDEN OF PROVING EACH OF THE
ELEMENTS OF AN ESTOPPEL IS UPON
APPELLEES, AND THE PROOF MUST BE
BY EVIDENCE CLEAR, CONVINCING AND
SATISFACTORY

In its Opinion this Court said:

"If appellants are correct as to any one of these elements of estoppel, the judgment cannot stand since all five elements must be found to exist. *Gerard vs. Sanner*, 110 Mont. 71, 103 Pac. (2d) 314. The burden of proving each of these elements is upon appellees, *Waddell vs. School District No. 2*, *supra*, and such proof must be by *clear, convincing and satisfactory evidence*. *Fiers vs. Jacobson*, 123 Mont. 242, 211 Pac. (2d) 968." (Emphasis supplied.)

In amplification of this rule, the Courts have indicated how clear, convincing and satisfying the evidence must be to establish an estoppel, by saying over and over again that "Estoppels are odious, * * *." *Fiers vs. Jacobson*, *supra*. The Courts have repeatedly held that proof clear, convincing and satisfactory requires something more than a mere preponderance of evidence. It is proof to a moral certainty, not just a slight tipping of the scales. *Dewey vs. Spring Valley Land Co.*, 73 N. W. 565, 98 Wis. 83, *Cross*

vs. Ledford, 120 N. E. (2d), 161 Ohio St. 469. With these rules in mind, we turn to a consideration of the sufficiency of the proof to establish by proof clear, convincing and satisfactory the elements of the estoppel found to exist.

In its Opinion, this Court quoted with approval from *Gypsy Oil Company vs. Marsh*, 121 Okla. 135, 248 Pac. 329, and accepted the definition of the five essential elements of estoppel, (1) False representation or concealment; (2) Knowledge, actual or constructive of the real facts; (3) Lack of knowledge or means of knowledge of the real fact on the part of the party claiming the estoppel; (4) Intention that the concealment or misrepresentation be acted upon; (5) Reliance upon the misrepresentation or concealment to the prejudice of the one claiming the estoppel.

THERE IS ABSOLUTELY NO PROOF OF MISREPRESENTATION OR CONCEALMENT OF FACTS WITH THE INTENT ON THE PART OF THE APPELLANTS TO MISLEAD APPELLEES.

We respectfully ask the Court to re-read its Opinion beginning with the fourth paragraph at page 7 through the second paragraph on page 9, and ask whether what is there set out indicates to a reader of the opinion in any manner that appellees sustained the burden of showing by evidence, *clear, convincing and satisfactory* that appellants concealed or misrepresented the facts. This language of the Court itself demonstrates better than could any argument on appellant's part that the holding of the Court that appel-

lees are guilty of deliberate misrepresentation or concealment can be based only on "mere conjecture" and "by argument, inference or intendment" contrary to the law universally applied and as stated in 31 C. J. S. 457.

This language shows that the Court, contrary to every decision that we have been able to find and contrary to its own pronouncement in the second paragraph of page 7 of the Opinion, has shifted the burden of proof to appellants to show there was no concealment or misrepresentation. Mere inaction or silence will not establish an estoppel. Under the record here, had we offered no proof as to any knowledge or any notice or any action on our part from April 21st, 1951, to December 3rd, 1952, when the suit was instituted, the appellees would have failed to establish by proof, *clear, convincing and satisfactory* that appellants *deliberately concealed or misrepresented* the facts from any one of the appellees.

But appellants did not do this. Instead, appellants introduced testimony as to conversations between representatives of the appellants and an agent of appellee Shell. Granting that the testimony of Wight as to dates was unclear, the fact remains that the conversations took place sometime prior to the filing of the suit and perhaps even prior to the making of the agreement between Shell and Montana-Dakota Utilities and Fidelity Gas. If Wight had intended to conceal the facts, would he have offered to lease the lands to Shell? The word "conceal" means to hide, to cover up and to establish concealment. The appellees

had to prove the hiding, the covering up. Where is the concealment here? It does not exist.

But this was not all. On July 16th, 1951, not more than seven weeks after the letter of April 21st, 1951 was received, appellant H. C. Smith wrote his letter of July 16th, 1951. (Exhibit 30). It makes no difference as to the first element—the intentional concealment or misrepresentation—whether Shell received this letter or not, although the Court's conclusions that it had not is startling in the light of the record and in the light of the Court's own comment as to the reply of Montana-Dakota Utilities which on its face shows that a copy of the letter had been sent to appellee Shell. The letter of H. C. Smith was not a concealment of facts or a misrepresentation of facts, but it was an assertion of the very claim made in the principal suit. The Court does not suggest that a delay of seven weeks in asserting his claim would be a delay sufficient to estop appellant Smith. We cannot believe that the Court can adhere to its determination that appellant Smith was guilty of concealment or misrepresentation.

What is true of the letter of H. C. Smith is true also of the letter of appellant Cedar Creek of September 12th, 1952. (Exhibit 37). It is true that this latter letter may have been late in time, but it was sent some months prior to the filing of the suit and in the light of this record, with no drilling within 35 miles of the area involved, at the time the letter of the 12th was sent, and in the light of the decision, the delay was not an unreasonable one.

Whether it was or not, the sending of the letter negatives completely the *intentional concealment* or misrepresentation of facts on the part of Cedar Creek.

A re-reading of our briefs indicates that appellants may not have sufficiently emphasized this first element of an estoppel, particularly the requirement that proof of this first element of concealment and misrepresentation must show a *deliberate* intent on the part of the appellants to conceal or misrepresent.

We did cite the Montana statute, however, that statute succinctly stating the rule announced by every Court in every jurisdiction. The applicable provision of the Montana statute, *Section 93-1301-6, Subsection 3, R. C. M. 1947*, reads:

“Whenever a party has by his own declaration, act or omission, *intentionally and deliberately* led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act or omission, be permitted to falsify.” (Emphasis supplied)

It is not enough that the one claiming the estoppel was misled, and we deny emphatically that the proof here supports any conclusion that any of the appellees were misled, there must have been proven an *intent* on the part of the one claimed to be estopped to mislead.

The rule is aptly stated in *Scott vs. Jardine Gold Mining & Milling Company*, 79 Mont. 485, 495, 257 Pac. 406:

"Mere silence cannot work an estoppel. To be effective for this purpose, the person to be estopped must have had *an intent* to mislead or a willingness that another should be deceived, and the other must have been misled by the silence. 10 R. C. L. 693; Moore vs. Sherman, *supra*. An estoppel in pais never takes place where one party did not *intend* to mislead and the other is not actually misled." (Emphasis Supplied)

There being absent here completely any proof of concealment or misrepresentation with the intent to mislead, there can be no estoppel.

APPELLEES DID NOT PROVE BY CLEAR,
CONVINCING AND SATISFACTORY EVIDENCE
ELEMENT NUMBER 3 THAT ANY
OF THE APPELLANTS WAS WITHOUT
KNOWLEDGE OR MEANS OF KNOWLEDGE
OF THE FACT THAT APPELLANTS CLAIMED
THE FIDELITY AGREEMENTS WERE TERMINATED

By its opinion the Court concluded that appellees, Montana-Dakota Utilities and Fidelity Gas had knowledge of the real facts. In that situation, certainly there could be no estoppel as to those appellees. The Court concludes that since Shell itself did not receive a reply to a letter, that of April 21st, 1951, from Montana-Dakota Utilities to these appellants, it had no duty to make any inquiry as to the status of the title to the lands here involved. Appellants owed no duty to communicate with Shell at all. Their obligations were to Montana-Dakota Utilities and Fidelity

Gas, and the letter of H. C. Smith dated July 16th, 1951, put Montana-Dakota Utilities and Fidelity Gas on inquiry. Montana-Dakota answered Smith's cancellation notice by letter dated August 9th, 1951. In its footnote, the Court said:

"This letter carries a notation at the bottom that a copy was to be sent to Shell Oil Company, Mr. Armin Johnson. The record is silent as to whether this was actually done."

Certainly this notation indicates that the universal practice of lawyers and the business world to show on letters by similar notations that copies had been sent to those indicated, raises the presumption that what is noted is actually carried out. Once that letter was introduced, *without objection*, and without any testimony on the part of appellee to negative its receipt by Shell, the only conclusion allowable is that Shell did receive the Montana-Dakota Utilities' letter to H. C. Smith (Exhibit 31), which shows on its face that appellant H. C. Smith at least, was then claiming that the Fidelity agreement was dead. It takes no evidence to establish that in the ordinary course of business, a copy of a letter is sent as indicated by the notation appearing on it, and the presumption is "That the ordinary course of business has been followed." *Section 93-1301-7, Subsection 20, R. C. M. 1947.*

This is particularly true here where appellees introduced no testimony that Shell actually had no knowledge of appellants' claims. A holding of lack of knowledge has to

rest on a presumption, on argument, on speculation, all of which disappears in the face of Exhibit 37.

We again call the Court's attention to the language of Exhibit 5, the agreement between Montana-Dakota Utilities and Fidelity with Shell. Montana-Dakota Utilities and Fidelity solemnly agreed to notify Shell of claims of title defects. What justification is there to assume that that pledge was not kept?

While we had no burden to prove knowledge of our claims long prior to the filing of the suit, the record contains a prima facie showing of actual knowledge by Shell, as well as by Montana-Dakota Utilities and Fidelity. The appellees have failed to prove element Number 2.

THE APPELLEES DID NOT PROVE BY EVIDENCE CLEAR, CONVINCING AND SATISFACTORY THAT SHELL RELIED ON A BELIEF THAT APPELLANTS WERE NOT CLAIMING THE FIDELITY AGREEMENT HAD TERMINATED

The most glaring failure of the appellants to prove the elements of estoppel is the case of the fifth element, reliance, and action to the prejudice of any of the appellees. By the Court's own language, the evidence of reliance is circumstantial only, and the most the Court can say for it is that it is ample to *tend* to prove reliance. The Court misread the record when it found, as it did on page 12,

that the evidence “. . . establishes the Ceder Creek Anticline to the single geological structure * * *.” There is no such evidence. The witness DeWolf testified that as to the upper horizons above 2,500 feet, it was a single geological structure. The witness Barnes was called to prove that it was a single structure as to the lower sands, but because of his refusal to submit for examination the data upon which he based his opinion, and upon objection of appellants, he was not permitted to so testify. (Tr. 687) That it is not a single geological structure insofar as the lower sands are concerned is affirmatively established by the fact that dry holes were drilled between Unit 5 and the Little Beaver to the south, and between Unit 5 in the Cabin Creek area to the north. The record simply does not support the Court's conclusion that the anticline is a single geological structure insofar as it applies to the lower sands.

Bearing in mind that estoppels are odious, that the burden of proof should have been on appellees, we ask the Court to re-examine its language in the last full paragraph on page 12.

We respectfully submit that this language of the Court itself shows conclusively that it is only by shifting the burden of proof to appellants and indulging every presumption against appellants and only then by conjecture can the Court find proof of reliance.

As to a determination that the circumstantial evidence establishes the reliance, as a general rule, circumstantial

evidence may be relied upon only where direct evidence is lacking, or to corroborate direct evidence. Appellees made no showing why direct evidence of reliance was not introduced. Obviously it was available. As we urge in the briefs, we urge again now that failure to introduce that direct evidence can be explained only upon a belief on the part of appellees that the direct evidence would not support their position on the estoppel. Had the Court been guided by a belief that estoppels are odious, and are applied only where the proof is clear, convincing and satisfactory, we do not believe it could have held the circumstantial evidence sufficient to establish reliance on the part of Shell. Certainly the circumstantial evidence fails to meet the test as stated in *Scarborough vs. Aero service*, 155 Neb. 749, 53 N. W. (2d) 902, 30 A. L. R. (2d) 1159 where the Court said:

“In addition to direct evidence, or in the absence of the same, circumstantial evidence can be sufficient to sustain a verdict depending solely thereon for support if the circumstances proved by the evidence are of such a nature and so related to each other that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom.”

Here Shell had entered into the agreement, Exhibit 5, under which it bound itself to do all of the drilling that it did prior to the time of the suit. All of the drilling performed prior to the institution of the suit was many miles remote from the lands here involved. These lands represented less than three percent of the total acreage involved. There was no proof that any geophysical work

had been done upon the lands of the appellants. The circumstances were as consistent with non-reliance as with reliance. Under the law the circumstantial evidence could not be a basis for a determination of reliance. Certainly it falls far short of proof, clear, convincing and satisfactory of reliance. If we grant that the circumstantial evidence, and we do not grant it, *tends* to show reliance, can the Court be satisfied that the appellees bore the burden of proof required?

Reliance is further negated by the testimony of Cecil Smith that the dry hole in Unit 5, the Warren Well, tended to condemn the area, (Tr. 610, 611, 612) and that prospects for oil were better in Units 8A and 8B. At the time of the agreement, Exhibit 5, prospects were not good for oil in Unit 5 and the drilling prior to the trial and no one disproved that view.

And where is the proof clear, convincing and satisfactory that Shell acted to its prejudice because it thought these leases were still alive? Did anyone testify Shell would not have proceeded with its drilling program it bound itself to perform under its agreement with Montana-Dakota and Fidelity if it knew of appellants' claims? Do any circumstances support such an inference? Filing of this suit did not stop their program. The only proof that would satisfy their burden would be testimony that had appellants promptly asserted their claim—and we assert they did—Shell

would not have carried out its obligations under the contract. Exhibit 5. The suggestion is ridiculous.

We earnestly believe that had the Court duly considered the agreement, Exhibit 5, its decision would have been otherwise.

We recognize the difficulty in writing opinions that will sufficiently set out the salient facts. Here the record was long and the facts somewhat complicated and, therefore, the difficulty was greater than usual, but this Opinion omits reference to certain facts in addition to some errors of fact, that make the decision even more untenable.

As we have pointed out, the statement that this is all one geological structure finds no support in the record. In the light of the many decisions in our reply brief, the mistake as to the date of the filing of suit is most significant. The suit was filed December 3rd, 1952, not on February 2, 1953. A further statement which we believe finds no support in the record is that Shell spent \$12,000,000.00 in conducting the program contemplated by the Fidelity Operating Agreements. Exhibit 60 shows that 28 of the 53 wells drilled are in Townships 11 and 12, entirely outside the area contemplated by the Fidelity Operating Agreements, and that nearly \$6,000,000.00 of \$12,000,000.00 was spent on these wells.

We believe too that an understanding of the significance of the Court's Opinion cannot be reached without knowledge of the provisions of the Montana-Dakota Utilities,

Fidelity, Shell Agreement, Exhibit 5. That agreement shows the true basis for Shell's drilling program and that agreement conclusively negates the reliance found to exist. By paragraph 3 of the Agreement, Shell agreed to commence a well in Townships 11 or 12 at once. This it obligated itself to do no matter what the condition of the titles.

Other provisions deal with the result of failure of specific titles, further drilling and so forth, and all show how unreasonable it is to assume the failure of title to any specific title would have changed Shell's plans one iota. Most significant is the language of paragraph 5 requiring Shell to drill somewhere south of the north line of Township 8 within 2 years. By the agreement itself, neither party contemplated drilling anywhere near Unit 5 until five months after this suit was brought.

THE RECORD DOES NOT SUPPORT THE
HOLDING OF THE COURT THAT THE AP-
PELLANTS SHOULD NOT PREVAIL ON THE
MERITS

Upon the trial, appellants insisted that by the language of the Operating Agreement itself, and particularly paragraphs 3 and 4 thereof, appellees Montana-Dakota Utilities and Fidelity Gas had failed to exercise the option which would keep the leases alive. We felt that there might be ambiguity in these provisions of the contract and, therefore,

offered testimony as to the circumstances under which the contract was negotiated. (Tr. 253, 254, 255, 290, 291, 292, 293, 294, Appellants' Brief 66, 67, 68, 69.) Our offers of proof establish that the parties fully understood that paragraph 4 established a time limit within which the option could be exercised. Under the authorities cited in our brief, and particularly *Brown vs. Homestake Exploration Company*, 98 Mont. 305, 39 Pac. (2d) 168 and *Ming vs. Pratt*, 22 Mont. 262, 36 Pac. 279 it was error for the Court to exclude the testimony. This Court, in its Opinion, made no reference to those decisions nor did it make any reference to the many cases cited wherein the Courts have repeatedly held that forfeitures of oil and gas leases are favored. Neither is there any discussion in the Opinion of the authorities appearing in our brief requiring that all ambiguities in contracts be resolved against the scrivener and in the case of oil and gas leases, against the lessee.

A tremendously complicated case with a record of more than 700 pages is disposed of on its merits in two short paragraphs. They represent a sort of slamming of the door in appellants' faces after they have been thrown out by the holding of the Court as to estoppel. We believe had the holding on estoppel been to the contrary, the Court would have given greater consideration to the merits of the cause and that had the Court given that consideration, the holding would have been for the appellants on the merits.

We urge that no evidence is necessary to establish that a delay of 17 years is not good field practice, particularly in the light of the provisions of paragraph 3 of the contract. The delay alone is sufficient to establish a prima facie case for the appellants. In any event, Judge Murray tried the case and heard the evidence. He determined, as a part of his judgment, as stated in his Memorandum, that appellants were entitled to present evidence as to what constitutes good practice in the event his holding on estoppel, laches and waiver was erroneous. That ruling, of course, was based on a desire on his part to do justice. It seems to appellants his view is entitled to consideration and that it was not clearly erroneous, and in the event the Court grants a rehearing as to the estoppel, and in the event it does not determine that the contract itself fixes the time limit in the exercise of the option, then the cause should be returned to the District Court for the taking of additional testimony.

CONCLUSION

There are not many ways of saying black is black and white is white, and for that reason this Petition for Rehearing must, of necessity, repeat some of the argument appearing in appellants' brief. We most earnestly urge, however, that the ruling of the Court as to the estoppel results in white becoming black and black becoming white. We respectfully submit that appellees failed to prove the essential elements of an estoppel by evidence clear, convincing

and satisfactory or at all, and that the Court's decision results in the doctrine of estoppel being used as a sword and not as a shield to prevent injustice. We respectfully urge that this Petition for Rehearing be granted.

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